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## Holding the Spymasters Accountable after 9/11: A Proposed Model for CIA Disclosure Requirements under the Freedom of Information Act

Martin E. Halstuk

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# **Holding the Spymasters Accountable After 9/11: A Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act**

*by*  
 MARTIN E. HALSTUK, PH.D.\*

I.	Introduction .....	81
II.	Transparency or Secrecy.....	86
A.	A Philosophy of Full Disclosure—The Freedom of Information Act.....	87
1.	The FOIA and National Security.....	93
2.	Congress Reins In Agency Discretion.....	97
B.	The National Security Act of 1947 .....	99
III.	<i>CIA v. Sims</i> —Carte Blanche Secrecy .....	102
A.	The Supreme Court Majority Opinion .....	106
B.	The Marshall Concurrence.....	109
IV.	<i>Sims</i> as Precedent .....	112
V.	The Argument for a Congressional Remedy .....	117
A.	Contravening Legislative Intent .....	118
B.	The Myth of “Great Deference” .....	120

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C. A Model for CIA Disclosure Requirements Under  
the Freedom of Information Act .....127

1. Congress needs to establish that CIA withholding  
decisions are subject to the FOIA, including key  
Exemption 1 provisions permitting de novo judicial  
review and requiring the segregation and release of  
unclassified material. ....129

2. Congress needs to appoint a special court that  
would deal exclusively with access disputes  
concerning national security. ....131

VI. Conclusion.....133

## I. Introduction

In the two official government inquiries into the September 11, 2001, attacks, investigators issued reports sharply critical of the nation's intelligence agencies.<sup>1</sup> The National Commission on Terrorist Attacks Upon the United States, commonly known as The 9/11 Commission, concluded that the attacks "revealed four kinds of failures: in imagination, policy, capabilities, and management."<sup>2</sup> A joint panel of the Senate and House intelligence committees noted that the Central Intelligence Agency, the Federal Bureau of Investigation and the Pentagon's spy services "missed opportunities" that would have "greatly enhanced" the chances of exposing Usama bin Laden's terrorist conspiracy.<sup>3</sup> Both reports found that the attacks might have been thwarted if the spy agencies had done a better job of sharing and publicizing some of the information they possessed about the activities of known and suspected al Qaeda members.<sup>4</sup> As a *Washington Post* editorial observed, "[N]obody's eyes were seeing enough of the picture to make sense of all the data."<sup>5</sup>

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1. See The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004) [hereinafter THE 9/11 COMMISSION REPORT]. The 567-page 9/11 Commission report, released July 22, 2004, was prepared over nineteen months by a ten-member nonpartisan panel headed by Thomas Keane, former governor of New Jersey; Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the U.S. Sen. Select Comm. on Intelligence and U.S. House Permanent Select Comm. on Intelligence, S. REP. NO. 107-351 (2002) & H.R. REP. NO. 107-792 (2002) [hereinafter Senate and House Select Comm. Report]. The nearly 900-page Senate and House joint report was prepared over seven months by a panel of the Senate and House intelligence committees. The joint panel report was completed December 2002, but it was classified at the time. The report was declassified and released July 24, 2003. See David Johnston, *Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A1, A13; Dana Priest, Susan Schmidt & David Von Drehle, *Hill's 9/11 Probe Finds Multiple Failure; White House, CIA Kept Key Portions of Report Classified*, WASH. POST., July 25, 2003, at A1, A16.

2. THE 9/11 COMMISSION REPORT, *supra* note 1, at 339. See also Philip Shenon, *9/11 Report Calls for a Sweeping Overhaul of Intelligence*, N.Y. TIMES, July 23, 2004, at A1; Dan Eggen, *9/11 Panel Chronicles U.S. Failures: Final Report Faults Two Administrations and Calls for Broad Reforms*, WASH. POST., July 23, 2004, at A1.

3. Senate and House Select Comm. Report, *supra* note 1, at xv.

4. THE 9/11 COMMISSION REPORT, *supra* note 1, at 353, 355-56, 400-03; Senate and House Select Comm. Report, *supra* note 1, at xvii.

5. *What Went Wrong*, WASH. POST., July 25, 2003, at A24. The Senate and House joint inquiry found that "[s]ome significant pieces of information in the vast stream of data being collected were overlooked, some were not recognized as potentially significant at the time and therefore not disseminated . . . [T]he Intelligence Community failed to fully capitalize on available, and potentially important, information." Senate and House Select Comm. Report, *supra* note 1, at xi.

In particular, The 9/11 Commission Report, released in July 2004, and the Senate and House joint panel report, released in July 2003, singled out the CIA for withholding certain information that led to a string of operational failures and missteps before the attacks.<sup>6</sup> In examining the roles and responsibilities of the nation's respective intelligence agencies, The 9/11 Commission Report concluded that "[b]efore 9/11, the CIA was plainly the lead agency confronting al Qaeda."<sup>7</sup> Federal investigators found that, for nearly two years before the attacks, the CIA had been aware of the terrorist ties of two 9/11 hijackers who were living in Southern California,<sup>8</sup> and the Agency had received reports of terrorist threats within the United States but did not consider a public alert.<sup>9</sup> The 9/11 Commission Report revealed that the CIA had received a briefing paper entitled "Islamic Extremist Learns to Fly" just weeks before the attacks.<sup>10</sup> The briefing told of the arrest of jihadist Zacarias Moussaoui, who was taken into custody in Minnesota in mid-August 2001 after his behavior aroused the suspicions of his flight school instructor who contacted local authorities. The CIA did not investigate the information further.<sup>11</sup>

In fact, as early as December 1998, four months after Usama bin Laden ordered the bombings of two U.S. embassies in East Africa, former CIA Director George J. Tenet issued a memo to several top intelligence officials declaring a new phase in the conflict with bin Laden.<sup>12</sup> "We are at war," Tenet wrote. "I want no resources or people spared in this effort."<sup>13</sup> The CIA shared some information with senior government officials, but the imminent dangers perceived by the Agency and its declaration of war were never made public.<sup>14</sup> In

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6. THE 9/11 COMMISSION REPORT, *supra* note 1, at 353.

7. *Id.* at 400.

8. *See id.* at 215-21; Senate and House Select Comm. Report, *supra* note 1, at 143-52. *See also* Johnston, *supra* note 1, at A13.

9. *See* THE 9/11 COMMISSION REPORT, *supra* note 1, at 353-58; Senate and House Select Comm. Report, *supra* note 1, at 118. *See also* Priest, *supra* note 1, at A1; David Johnston, *The Warnings Were There. But Who Was Listening?* N.Y. TIMES, July 27, 2003, at A1.

10. THE 9/11 COMMISSION REPORT, *supra* note 1, at 347.

11. *Id.*

12. CIA Director Tenet abruptly resigned June 3, 2004. *See* Elisabeth Bumiller and Douglas Jehl, *Tenet Resigns as C.I.A. Director; 3 Harsh Reports Due*, N.Y. TIMES, June 4, 2004, at A1, A12. Tenet officially left his post on July 11, 2004. At this writing, President George W. Bush had nominated Florida Rep. Porter Goss to succeed Tenet. *See* Dana Priest & Mike Allen, *Bush Nominates Rep. Goss to Run CIA Democrats Question Independence of Republican Veteran of Agency*, WASH. POST, Aug. 11, 2004, at A1.

13. THE 9/11 COMMISSION REPORT, *supra* note 1, at 357.

14. *Id.*

other words, the CIA fought this “war” in secret and without the aid of perhaps the nation’s most powerful weapon—an alerted American public, fully informed about the grave and immediate threat posed by the bin Laden terror network.<sup>15</sup>

The Senate and House joint panel report concluded that the CIA-led intelligence community had enough information before the attacks to prompt a “heightened sense of alert” and take defensive measures such as strengthening aviation security; placing suspected terrorists here and abroad on watch lists; coordinating investigation and law enforcement efforts with local and state authorities; and alerting the American public to the seriousness and immediacy of the potential threat.<sup>16</sup>

For the last two decades, near-blanket CIA secrecy has gone largely unchecked, principally because of a sweeping 1985 U.S. Supreme Court decision that exempted the Agency from virtually any disclosure requirements under the Freedom of Information Act (FOIA).<sup>17</sup> This exemption, established in *Central Intelligence Agency v. Sims*,<sup>18</sup> granted the Director of Central Intelligence broad and unreviewable authority to protect intelligence sources and methods from unauthorized disclosure.<sup>19</sup> Although there had been a line of pre-*Sims* lower court decisions that upheld Agency decisions to refuse certain FOIA requests,<sup>20</sup> the *Sims* decision has come to stand for the Supreme Court’s broadest and most forceful support of unchecked CIA secrecy and nearly total judicial deference to Agency discretion.<sup>21</sup>

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15. See THE 9/11 COMMISSION REPORT, *supra* note 1, at 103.

16. Senate and House Select Comm. Report, *supra* note 1, at xv, 118.

17. See *CIA v. Sims*, 471 U.S. 159 (1985).

18. *Id.*

19. *Id.* at 168-70.

20. See, e.g., *Miller v. Casey*, 730 F.2d 773, 778 (D.C. Cir. 1984) (granting deference to CIA discretion in the withholding of nonclassified historical research documents); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (affirmed summary judgment in favor of the CIA in a FOIA Exemption 1 national security action on the basis of agency affidavits as long as they simply contain “reasonable specificity” and are not called into question by contradictory evidence or by evidence of Agency bad faith); *Baker v. CIA*, 580 F.2d 664, 670 (D.C. Cir. 1978) (granting CIA discretion over withholding decisions); *Nat’l Comm’n On Law Enforcement and Soc. Justice v. CIA*, 576 F.2d 1373, 1377 (9th Cir. 1978) (declining *in camera* review and holding that simply the submission of affidavits was sufficient to grant summary judgment in favor of CIA); *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (“What may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context”).

21. See *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379, at \*14 (N.D. Tex. Feb. 26, 1999), *aff’d mem.*, 208 F.3d 1007 (5th Cir. 2000).

Indeed, the *Sims* ruling continues to resonate today because the uncurbed secrecy it sanctions effectively blocks public and press efforts to evaluate CIA performance, thus making accountability difficult, if not impossible. For example, in 2004 the Supreme Court let stand a federal appellate court decision that cited *Sims* repeatedly in its rationale to allow the government to withhold basic information on persons detained after the September 11 terrorist attacks.<sup>22</sup> In other recent rulings, courts followed *Sims* to reject FOIA requests for:

- A 40-year-old CIA compilation of biographies of Cuban leaders;<sup>23</sup>
- Unclassified records on CIA involvement in the award of an oil-production agreement with the former Yemen Arab Republic;<sup>24</sup>
- Information sought by a doctoral student on the participation of deceased British poets Stephen Spender and T.S. Eliot in a CIA-funded cultural organization;<sup>25</sup> and
- The Clinton Administration's budget proposal for CIA intelligence-related activities in 1999.<sup>26</sup>

The debate over the 9/11 tragedy continues. It is hard to argue with absolute certainty that this nation's vast intelligence network could have prevented the nineteen suicide terrorists from hijacking four commercial airplanes and using them as missiles to attack New York City and Washington, D.C., killing nearly 3,000 people and setting the United States on a course of war in Afghanistan and Iraq. But what *is* certain, as The 9/11 Commission concluded, is that greater oversight and accountability of the nation's intelligence processes are vital to help avert future terrorist assaults in America.<sup>27</sup>

22. *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004). *See also* Linda Greenhouse, *Justices Allow Policy of Silence on 9/11 Detainees*, N.Y. TIMES, Jan. 13, 2004, at A1.

23. *Assassination Archives and Research Ctr. v. CIA*, 334 F.3d 55, 56 (D.C. Cir. 2003).

24. *Arabian Shield Dev. Co.*, 1999 U.S. Dist. LEXIS 2379, at \*2.

25. *Rubin v. CIA*, 01 CIV. 2274 (DLC), 2001 U.S. Dist. LEXIS 19413, at \*3 (S.D.N.Y. Nov. 30, 2001).

26. *Fed'n of Am. Scientists v. CIA*, Civ. No. 98-2107 (TFH), 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 12, 1999).

27. Throughout The 9/11 Commission Report, there are numerous references to the crucial importance of the accountability and oversight of intelligence operations: ("Congress needs dramatic change . . . to strengthen oversight and focus accountability," THE 9/11 COMMISSION REPORT, *supra* note 1, at xvi); ("The investigations spotlighted the

Revisiting the merits of the Supreme Court-crafted CIA exemption to the FOIA is a good place to start. The CIA's missteps and failures in connection with the 2001 terrorist attacks illustrate the follies of how excessive secrecy can not only cloak the Agency's activities but can also conceal grave problems in Agency management. Although several commentaries on *CIA v. Sims* were published around the time of the decision, the consequences of the ruling have been largely overlooked in law review literature since then.<sup>28</sup> The purpose of this article, therefore, is to take a fresh look at how the Supreme Court freed the CIA from virtually any accountability and disclosure obligations under the FOIA, and also to examine the subsequent impact of unchecked Agency secrecy over the years. In particular, this article seeks to shed light on the question of whether the *Sims* Court ruling comported with the plain meaning and legislative history of the FOIA.<sup>29</sup> In Part II, this article examines the FOIA and also discusses the National Security Act of 1947,<sup>30</sup> the statute on which the *Sims* Court relied to exempt the CIA from the FOIA. Part III analyzes the Court's majority opinion in *CIA v. Sims*, along with a concurring opinion that sharply disagreed with the majority's reasoning. In Part IV, this article reviews the line of cases to date that have cited *Sims* as precedent to deny a wide variety of FOIA requests.<sup>31</sup> Part V argues that the *Sims* rationale for blanket

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importance of accountability," *id.* at 99); ("[T]he oversight function of Congress has diminished over time. . . . The unglamorous but essential work of [intelligence operations] oversight has been neglected, and few members (of Congress) past or present believe it is performed well," *id.* at 105); ("Of all our recommendations, strengthening congressional oversight may be among the most difficult and important," *id.* at 419); ("Congressional oversight for intelligence—and counterterrorism—is now dysfunctional," *id.* at 420).

28. See Brent Filbert, *Freedom of Information Act: CIA v. Sims*, *The CIA Is Given Broad Powers to Withhold the Identities of Intelligence Sources*, 54 UMKC L. REV. 332 (1986); Jeffrey R. Godley, *Administrative Law—Defining the CIA's 'Intelligence Sources' as an Exemption to the Freedom of Information Act—CIA v. Sims*, 471 U.S. 159 (1985), 9 W. NEW ENG. L. REV. 333 (1987); James A. Goldston, Jennifer M. Granholm, & Robert J. Robinson, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409 (1986); Mark Jordan, Comment, [CIA v. Sims, 105 S. Ct. 1881 (1985)] *Freedom of Information Act: CIA's Right to Nondisclosure Broadened by Liberal Definition of Intelligence Source*, 25 WASHBURN L.J. 586 (1986); Amy E. Rees, *Recent Developments Regarding the Freedom of Information Act: "Prologue to a Farce or a Tragedy; or, Perhaps Both,"* 44 DUKE L.J. 1183 (1995); Michael H. Hughes, Note, *CIA v. Sims; Supreme Court Deference to Agency Interpretation of FOIA Exemption 3*, 35 CATH. U. L. REV. 279 (1985).

29. 5 U.S.C. § 552 (2000).

30. Pub. L. No. 80-253, § 102(d)(3), 61 Stat. 495, 498 (1947) (codified at 50 U.S.C. § 403(d)(3)(2000)).

31. *Assassination Archives*, 334 F.3d 55 (2003); *Ctr. For Nat'l Sec. Studies*, 331 F.3d 918; *Minier v. CIA*, 88 F.3d 796 (9th Cir. 1996); *Maynard v. CIA*, 986 F.2d 547 (1st Cir.



CIA secrecy has been long outmoded by watershed historic events such as the Vietnam War, the Watergate scandal and the end of the Cold War, which, in the aggregate, have prompted a profound shift in political culture in terms of what the American public has come to expect to know about their government and demand in transparency. Finally, Part V proposes a legislative model that would establish guidelines for CIA information disclosure requirements under the FOIA.

## II. Transparency or Secrecy

Government secrecy in the interests of American national security is an inherent key to effective intelligence operations, with a history as old as the nation itself.<sup>32</sup> However, the government's need for confidentiality and secrecy in foreign relations and national defense often conflicts with the democratic principles of an open society and the First Amendment rights of citizens to debate important national policy issues.<sup>33</sup> As one commentator observed: "Citizens can scarcely influence decisions they know nothing about. Where secrecy reigns, government officials are in a position to rule at virtually their own discretion."<sup>34</sup> Further, when government shields official actions from public knowledge and review, it becomes easier for governmental incompetence, corruption and abuse of power to go undetected.

*CIA v. Sims* illustrates this conflict between the democratic values of government transparency and the practical needs for

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1993); *Sullivan v. CIA*, 992 F.2d 1249 (1st Cir. 1993); *Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992); *Fitzgibbon v. CIA*, 911 F. 2d 755 (D.C. Cir. 1990); *Knight v. CIA*, 872 F.2d 660 (5th Cir. 1989); *Rubin*, 2001 U.S. Dist., LEXIS 19413; *Arabian Shield Dev. Co.*, 1999 U.S. Dist. LEXIS 2379; *Federation*, 1999 U.S. Dist. LEXIS 18135; *U.S. Student Ass'n v. CIA*, 620 F.Supp. 565 (D.D.C. 1985).

32. See Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 349-350 (1986).

For example, in the first twenty-nine essays of *THE FEDERALIST*, the main claim for union laid out by Alexander Hamilton, James Madison and John Jay focused on the risks of foreign war and influence. See *id.* A decade earlier, George Washington wrote to one of his secret agents during the War of Independence: "The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated." *Sims*, 471 U.S. at 172 n.16, citing John C. Fitzpatrick, ed., 8 WRITINGS OF WASHINGTON 479 (1933) (letter from George Washington to Colonel Elias Dayton, July 26, 1777).

33. See Edgar & Schmidt, *supra* note 32, at 352-53.

34. FRANCIS E. ROURKE, *The United States, in GOVERNMENT SECRECY IN DEMOCRACIES* 119 (Itzhak Galnoor ed., New York University Press 1977).

government secrecy.<sup>35</sup> In arriving at its conclusions in *Sims*, the Court needed to resolve the conflict between the opposing policy objectives clearly laid out in the Freedom of Information Act<sup>36</sup> and National Security Act.<sup>37</sup> This section discusses the legislative histories of these two statutes.

#### A. A Philosophy of Full Disclosure—The Freedom of Information Act

Congress passed the FOIA in 1966 and has amended it in significant ways over the decades.<sup>38</sup> The FOIA applies to records held by the myriad federal agencies, such as the Environmental Protection Agency, the Federal Aviation Administration and the Securities and Exchange Commission. It also applies to the cabinet offices, such as the departments of State, Defense and Commerce, and includes sub-departments such as the FBI, which is under the aegis of the Department of Justice.<sup>39</sup> The statute makes these records available to “any person” upon request, and places the burden of refusing disclosure on the government; a FOIA requester is not required to justify why a record should be disclosed.<sup>40</sup> The FOIA does not apply to records held by state or local governments, Congress, the courts, municipal corporations, private individuals, private companies, or private entities holding federal contracts.<sup>41</sup> Nor does it apply to the personal staff of the President and some executive-branch agencies whose sole function is to advise the President, such as the Council of Economic Advisors.<sup>42</sup>

To further inform the public about governmental activities and agency operations, the statute requires that federal agencies make available in public reading rooms and also publish—both in the Federal Register and on the Internet—their organizational plans and regulations.<sup>43</sup> The reason for this requirement is to guard against the

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35. See *Sims*, 471 U.S. at 191 (Marshall, J., concurring).

36. 5 U.S.C. § 552 (2000).

37. 50 U.S.C. § 403(3) (formerly codified at 50 U.S.C. § 404(d)(3)).

38. The FOIA was amended in several important respects in 1974, 1976, 1986, and 1996. Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 94-409, 90 Stat. 1241 (1976); Pub. L. No. 99-570, 100 Stat. 3207 (1986); and Pub. L. No. 104-231, 110 Stat. 3048 (1996).

39. U.S. Department of Justice, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 28, MAY 2002 [hereinafter FOIA GUIDE].

40. 5 U.S.C. § 552(f) (2000). See also *Sims*, 471 U.S. at 182 (Marshall, J., concurring).

41. FOIA GUIDE, *supra* note 39, at 29-31.

42. *Id.*

43. 5 U.S.C. § 552(a)(3),(4)(A) (2000). The Internet publication requirement was a provision in the Electronic Freedom of Information Act of 1996 (EFOIA), Pub. L. No. 104-231, §§ 1-12, 110 Stat. 3048-3054(1996)(amending sections of 5 U.S.C. § 552 (1994)).

development of secret law, such as an obscure order or opinion, known only to agency officials but not to the general public who use the FOIA.<sup>44</sup> The statute creates a judicially enforceable policy that favors a “general philosophy of full agency disclosure”<sup>45</sup> based on the principle that the “public as a whole has a right to know what its government is doing.”<sup>46</sup> As the Supreme Court observed: “The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>47</sup>

Until the FOIA was signed into law, the public and press had no legal recourse when they were denied access to government-held information.<sup>48</sup> The FOIA replaced Section 3 of the Administrative Procedure Act (APA) of 1946.<sup>49</sup> APA Section 3 ostensibly was a public information provision to allow the public to gain access to “matters of official record” held by the federal government.<sup>50</sup> However, the law contained vague language and loopholes that federal agencies routinely exploited to block public access to their records, and the law came to be widely regarded as an “excuse for secrecy” and more of a withholding statute than a disclosure statute.<sup>51</sup> One of the greatest roadblocks to disclosure in APA Section 3 was a provision that record requesters had to establish that the information they sought pertained specifically to them.<sup>52</sup> This restriction prevented

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44. See *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54 (1975); H.R. REP. NO. 89-1497, at 5 (1966). See also FOIA GUIDE, *supra* note 39, at 20.

45. S. REP. NO. 89-813, at 3 (1965). The Court has consistently recognized this principle. See, e.g., *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 494 (1994); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1976); *EPA v. Mink*, 410 U.S. 73, 80 (1973).

46. S. REP. NO. 89-813, at 5.

47. *Robbins Tire*, 437 U.S. at 242.

48. H.R. REP. NO. 89-1497, at 5 (1966). See generally HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (Columbia University Press 1953) & James Russell Wiggins, *FREEDOM OR SECRECY* (Oxford University Press 1964).

49. 5 U.S.C. § 1002 (1946).

50. S. REP. NO. 89-813, at 3.

51. A 1965 Senate report on the proposed FOIA legislation described the APA as “full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities.” *Id.* See also CROSS, *supra* note 48, at 223-28 (1953). Cross, a Columbia University law professor, an attorney for the *New York Times* and a leader in the movement to enact the FOIA, wrote that the governmental “cult of secrecy” that developed after the Second World War rested in great part on the “tortured interpretation” of APA Section 3. *Id.* at 246.

52. S. REP. NO. 89-813, at 5.

third parties, such as journalists, attorneys, businesses, public interest groups, historians and others from gaining access to government records. As a result of these flaws, Congress embarked on a series of hearings in 1955 to initiate open-government reform and create a judicially enforceable statutory right of public access to government records.<sup>53</sup> A decade and 173 hearings later, Congress passed the Freedom of Information Act of 1966.<sup>54</sup>

Over the years, the FOIA has proved to be a useful tool for informing the nation about important issues of public interest and for filling gaps in history with previously overlooked or concealed information.<sup>55</sup> When Congress passed the Electronic Freedom of Information Act in 1996,<sup>56</sup> House sponsors of the legislation noted that the FOIA has “led to the disclosure of waste, fraud, abuse, and wrongdoing” in the federal government, and the “identification of unsafe consumer products, harmful drugs, and serious health hazards.”<sup>57</sup> *The Philadelphia Inquirer* used the FOIA in 2003 to learn that federal citations for pollution law violations plummeted during the early years of the George W. Bush administration, dropping 35 percent in 2002-2003 from the year before.<sup>58</sup> Also in 2003, the *Dayton Daily News* used records acquired under the FOIA to report on the risks of violence, accidents, disease and suicide faced abroad by Peace Corps volunteers.<sup>59</sup> And in an award-winning 2002 investigative series,

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53. See Martin E. Halstuk, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent*, 4 COMM. L. & POL’Y 111, 116 (1999). From 1955 until 1960, Rep. John Moss presided over 173 hearings, which published 17 volumes of transcripts and 14 volumes of reports. See JOHN T. O’REILLY, *FEDERAL INFORMATION DISCLOSURE*, at 6-9 (West Group, 3d ed. 2000). (O’Reilly’s book, *Federal Information Disclosure*, is the leading legal practice guide on The Freedom of Information Act and the Privacy Act.) A series of proposed reform legislation and more hearings followed in 1963, and continued until the Freedom of Information Act was signed into law in 1966. See *id.* at 11-15.

54. 5 U.S.C. § 552 (2000).

55. See H.R. REP. NO. 104-795, at Sec. 2(a)(3)&(4) (1996).

56. Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, §§ 1-12, 110 Stat. 3048-3054 (1996) (amending sections of 5 U.S.C. § 552 (1994)).

57. H.R. REP. NO. 104-795, at Sec. 2(a)(3)&(4). For instance, investigations by journalists using the FOIA have exposed FBI harassment of Dr. Martin Luther King, safety hazards at nuclear power plants, unsanitary conditions at food processing plants, the presence of harmful wastes in drinking water and the increased incidence of cancer among plutonium workers. See KENT R. MIDDLETON, WILLIAM E. LEE AND BILL F. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATION* 482 (2003).

58. Seth Borenstein, *Pollution citations plummet under Bush*, PHILA. INQUIRER, Dec. 9, 2003, at A1.

59. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *HOW TO USE THE FEDERAL FOI ACT* 2, 9th ed., (2004). Previously, the *Dayton Daily News* used government documents obtained under the FOIA to report how the government largely

using documents obtained under the FOIA, the *San Francisco Chronicle* revealed that during the 1950s and 1960s, the FBI covertly campaigned to fire University of California President Clark Kerr and conspired with the CIA director to pressure the California Board of Regents to force out liberal professors.<sup>60</sup> Historians also use the FOIA to flesh out or set right the historical record. For example, a 2001 FOIA request by the National Security Archive disclosed for the first time that President Gerald Ford and Secretary of State Henry Kissinger had personally assured Indonesian leader Suharto that the United States would not oppose an Indonesian takeover of East Timor.<sup>61</sup> For a quarter-century, Ford and Kissinger had denied they knew of Indonesia's military plans.<sup>62</sup> The FOIA is also a valuable instrument of inquiry for the general public, as evidenced by the May 2004 disclosure that an Army sergeant who was captured along with fellow soldier Jessica Lynch, in the same March 2003 ambush during the war in Iraq, was later executed by Iraqi soldiers.<sup>63</sup> Sgt. Donald Walters originally had been listed as killed in action, but after his mother sought the details of his death through a FOIA request, the government revealed the true circumstances, and his killing was subsequently investigated as a war crime.<sup>64</sup>

The FOIA's crafters understood that citizens in a democracy must have access to government information in order to make informed decisions.<sup>65</sup> Lawmakers also acknowledged, however, that instances arise when secrecy is necessary for government to function effectively and to protect the privacy of individuals and businesses.<sup>66</sup>

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ignored sexual assault charges brought by women in the military against enlisted men and officers. *Id.*

60. Seth Rosenfeld, *Winning series uncovers FBI secrets using the FOIA*, THE BRECHNER REPORT, Dec. 2003, at 4. *See also* [www.sfgate.com/campus](http://www.sfgate.com/campus) (last visited Jan. 13, 2004).

61. The 1975 East Timor invasion left more than 100,000 dead in a brutal occupation that did not end until 1999 when international peacekeepers were sent in. *See* The National Security Archive, *East Timor Revisited* (Dec. 6, 2001), at <http://www.gwu.edu/~NationalSecurityActrchiv/NATIONALSECURITYACTEBB/NATIONALSECURITYACTEBB62/> (last visited Feb. 24, 2004).

62. The Ford Administration wanted to shore up ties with Indonesia, a noncommunist country that produced oil and controlled key sea lanes in Southeast Asia. *Id.*

63. Associated Press, *The Casualties: New Account of '03 Ambush Changes Way a Soldier Died*, N.Y. TIMES, May 29, 2004, at A8.

64. *Id.*

65. *See* H.R. REP. NO. 89-1497, at 2-3, 5-6 (1966).

66. S. REP. NO. 89-813, at 3 (1965) ("At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally

Congress, therefore, created nine statutory exemptions that cover certain categories of information that agencies may—but are not required to—withhold.<sup>67</sup> Congress emphasized that the exemptions were limited, and outside of these enumerated categories, “all citizens have a right to know.”<sup>68</sup> As a 1965 Senate report noted, the FOIA thus provides a “workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.”<sup>69</sup>

The FOIA’s legislative history shows that Congress was guided by a philosophy that directly linked a policy of full agency disclosure to bedrock democratic principles.<sup>70</sup> The Senate report that accompanied the FOIA legislation observed that the “great importance of having an information policy of full disclosure” becomes apparent when one considers the hundreds of myriad agencies and departments of the executive branch.<sup>71</sup> In a series of majority opinions, the Supreme Court has consistently cited this 1965 Senate report as the primary indicator of the FOIA’s legislative purpose.<sup>72</sup>

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important rights of privacy . . . certain material, such as the investigatory files of the Federal Bureau of Investigation.”).

67. 5 U.S.C. § 552(b)(1-9). The FOIA does not apply to matters that fall under the categories of (1) classified information and national security; (2) internal agency personnel information; (3) information exempted by statutes; (4) trade secrets and other confidential business information; (5) agency memoranda; (6) disclosures that invade personal privacy; (7) law enforcement investigation records; (8) reports from regulated financial institutions; and (9) geological and geophysical information.

68. S. REP. NO. 89-813, at 6.

69. S. REP. NO. 89-813, at 3.

70. S. REP. NO. 89-813, at 3. and H.R. Rep. NO. 89-1497 (1966). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978); Dep’t of Air Force v. Rose, 425 U.S. 352, 360-61 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973).

71. S. REP. NO. 89-813, at 3.

72. Justice Byron White wrote: “Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to secure such information from possibly unwilling official hands.” *Mink*, 410 U.S. at 80, *citing* S. REP. NO. 89-813. Justice William J. Brennan wrote in 1976 that the FOIA’s legislative history makes it “crystal clear the congressional objective” for the Act was to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976)(quoting Rose v. Dep’t of the Air Force, 495 F.2d. 261, 263 (1974)). Brennan said the FOIA’s “basic purpose reflected ‘a general philosophy of full agency disclosure’” unless information falls under one of the nine exemptions. *Rose*, 425 U.S. at 360-61 (quoting S. REP. NO. 89-813, at 3 ). He stressed, however, that these exemptions are limited, and “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the act.” *Rose*, 425 U.S. at 361 (quoting Rose v. Dep’t of the Air Force, 495 F.2d. at 263 ).

Although the FOIA received overwhelming congressional support,<sup>73</sup> passing the House unanimously, enforcement of the law became difficult. Senate and House reports on the FOIA repeatedly emphasized that the statute directs federal agencies to provide as much disclosure as possible,<sup>74</sup> but many agencies resisted compliance, typically interpreting the exemptions broadly to justify withholding documents.<sup>75</sup> Consequently, Congress clarified and strengthened the FOIA in 1974 through several amendments, which were prompted in great part by the Watergate scandal during the Richard M. Nixon administration.<sup>76</sup>

One of the major changes was a substantial revision of Exemption 1, the national security exemption.<sup>77</sup> This analysis turns next to an examination of Exemption 1, which surfaced as a contentious issue in *CIA v. Sims*.<sup>78</sup> The legislative history of the 1974 amendments shows that Congress revised Exemption 1 explicitly to reiterate its intent to grant public access to agency records whenever possible—even when national security issues are raised.<sup>79</sup>

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73. The bill passed the House with a vote of 307-0. See H.R. REP. NO. 89-1497(1966).

74. See, e.g., H.R. REP. NO. 89-1497; S. REP. NO. 89-813.

75. ALLAN ROBERT ADLER, ED., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 8 (1997). Agency officials also used various ploys to discourage FOIA use, such as high fees for copying documents, long delays, and claims that they could not find the documents requested.

76. During the hearings on the proposed 1974 amendments, for example, Sen. Ted Kennedy referred to the Watergate Hearings, which were taking place at the same time:

If yesterday's testimony [by Nixon's Attorney General Elliot Richardson] teaches us anything, it demonstrates beyond debate that government secrecy breeds government deceit. High government officials sat around in the Attorney General's office calmly discussing the commission of bugging and mugging and kidnapping and blackmail. . . . Federal officials who want their activities to remain hidden from public view are going to have to tell us why, and their reasons are going to have to be very convincing and very specific.

*Executive Privilege, 2 Hearings Before a Subcomm. of the Sen. Judiciary Comm. and a Subcomm. of the Sen. Comm. on Government Operations*, 93d Cong., 209-10 (1973). See also O'REILLY, *supra* note 53, at 45. President Ford, who took office after Nixon resigned on August 8, 1974, vetoed the 1974 amendments, but Congress overrode the veto, with the House voting 371-31 and the Senate voting 65-27 on Nov. 20 and 21, 1974, respectively. See O'REILLY, *supra* note 53, at 48.

77. See 5 U.S.C. § 552(B)(1) (2000).

78. See *Sims*, 471 U.S. at 188-90 (Marshall, J., concurring). The Exemption 1 issue in *Sims* will be discussed in detail later in this article.

79. See H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974), reprinted in 1974 U.S. Cong. & Ad. News 6290. See Pub. L. No. 93-502, 1-3, 88 Stat. 1561, (1974).

### 1. *The FOIA and National Security*

Exemption 1, the national security exemption, is the only FOIA exemption that allows the executive branch, rather than Congress, to determine the criteria for disclosing information.<sup>80</sup> Exemption 1 states that the FOIA does not apply to matters that are both “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy *and are in fact . . . properly classified pursuant to such Executive Order.*”<sup>81</sup> The 1966 version of Exemption 1 said only that the FOIA did not apply to matters “specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy.”<sup>82</sup> The difference in language between the two versions, as indicated by the italicized text above, reflects Congress’ intent to provide for judicial review of purportedly classified documents to ensure that (1) the material actually falls under the specifically enumerated categories of information that can be classified under Executive Order, and that (2) the document was properly classified according to prescribed procedures.<sup>83</sup>

This 1974 check on *mere assertions* by the government that withheld information was classified came as a swift and direct congressional response to a 1973 Supreme Court decision that restricted access to records on national security grounds.<sup>84</sup> *Environmental Protection Agency v. Mink* concerned a request by Rep. Patsy Mink, who asked the government to release an interdepartmental report on a scheduled underground nuclear test off the Alaskan coast.<sup>85</sup> Mink wanted environmental impact statements contained in the report. The government refused to disclose the impact statements, contending that the report was classified “top secret” and, therefore, any material contained in the report was exempt from disclosure under Exemption 1.<sup>86</sup> Mink sued in the U.S. District Court for the District of Columbia to obtain the information under the FOIA, but the court granted summary judgment in favor of

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80. 5 U.S.C. § 552(b)(1) (2000).

81. 5 U.S.C. § 552(b)(1) (emphasis added).

82. 5 U.S.C. § 552(b)(1) (1966).

83. See H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6290. See Pub. L. No. 93-502, 1-3, 88 Stat. 1561, (1974).

84. EPA v. Mink, 410 U.S. 73 (1973).

85. *Id.* at 75.

86. *Id.* The government also cited Exemption 5 to defend its withholding decision. Under Exemption 5, the FOIA does not apply to inter- or intra-departmental memos or reports. 5 U.S.C. § 552(b)(5).



the government.<sup>87</sup> The U.S. Circuit Court of Appeals for the District of Columbia Circuit reversed the district court's decision, ruling that the national security exemption allowed the executive branch to withhold only the portions of the requested documents that were classified, not the entire record.<sup>88</sup> The court of appeals directed the lower court to conduct an *in camera* review of the files to determine whether the specific information requested was not classified and could be released.<sup>89</sup>

The government appealed to the Supreme Court, which reversed the D.C. Circuit's ruling in a decisive 7-to-1 vote, holding that classified documents were exempt from judicial review.<sup>90</sup> In arriving at its decision, the *Mink* Court deferred to the government's argument that *the mere assertion* of classification was sufficient to justify withholding the documents from the public.<sup>91</sup> The Court held that Congress had not intended to give courts the right to review documents that the government said were exempt on grounds of national security. The Court concluded that the government was required to only declare that the document (1) was classified and (2) its subject matter fell within the categories of information protected from disclosure by Executive Order.<sup>92</sup> The Court held that the government could meet its Exemption 1 burden simply by offering an affidavit that declared that the requested information was classified.<sup>93</sup>

Justice Byron R. White, who wrote the opinion, said Exemption 1's plain text was ambiguous and, in his view, it provided no oversight process to review whether proper procedure was used to classify a document: "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures. . . . But Exemption 1 does neither."<sup>94</sup> The Court held that the national security exemption neither permitted nor compelled *in camera* inspection by judges to sort out documents that were not classified.<sup>95</sup>

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87. *Mink*, 410 U.S. at 78.

88. *Id.*

89. *Id.*

90. *Id.* at 84.

91. *Id.* at 83-84.

92. *Id.* at 84.

93. *Mink*, 410 U.S. at 84-85.

94. *Id.* at 83.

95. *Id.* at 81.

Responding to the *Mink* Court's ruling, Congress said the Court had contravened the FOIA's legislative intent,<sup>96</sup> and lawmakers revised Exemption 1 to override the *Mink* decision.<sup>97</sup> In the 1974 FOIA amendments, Congress modified the national security exemption to give courts the power of *de novo* judicial review, including *in camera* inspection of documents, to look beyond the mere fact that material had been classified and to consider whether classification was proper.<sup>98</sup> Congress established that the Executive Order on Classified National Security Information must set out both substantive and procedural criteria for withholding national security information.<sup>99</sup> Substantive criteria spell out what *categories of information* may be considered for classification, and procedural criteria identify the *proper process* for classifying national security information.<sup>100</sup>

Even under Exemption 1's revised language, it should be noted that judicial oversight is strictly limited. A judge cannot challenge the classification standards adopted by a president; a judge can only determine whether the information was classified according to its content and proper procedure as set forth in an Executive Order.<sup>101</sup>

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96. See H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6290.

97. Pub. L. No. 93-502, 1-3, 88 Stat. 1561 (1974), codified at 5 U.S.C. § 552(a)(4)(B) (2000).

98. *Id.*

99. H.R. CONF. REP. NO. 93-1200 (1973-74).

100. For example, some of the categories mentioned in the current executive order include military plans, programs for safeguarding nuclear materials or facilities, foreign relations activities and intelligence activities. See Exec. Order 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) (George W. Bush Admin.). Regarding process, only specifically designated officials may classify information, and classified information must be marked to show the identity of the classification authority, the classification level and classification instructions. *Id.*

101. 5 U.S.C. § 552(b)(1). Presidential classification standards vary from administration to administration. See e.g. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) (George W. Bush Admin.); Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995) (William J. Clinton Admin.); Exec. Order No. 12,356, 3 C.F.R. 166 (1982) (Ronald Reagan-George H.W. Bush Admin.); Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (Jimmy Carter Admin.). For example, the Clinton Administration's 1995 executive order favored more disclosure than the Reagan and George H. W. Bush administrations, though less than Carter's. By comparison, President George W. Bush's 2003 executive order closely followed Clinton's.

A review of Presidential standards for classification over the past twenty-five years reveals varying philosophical differences between Republican and Democratic administrations when it comes to government transparency. President Carter, for example, tended to support a presumption for disclosure. In June 1978, he issued an executive order that favored declassification if the public interest in disclosure outweighed damage to national security that "might be reasonably expected" to result from disclosure." Exec.

Once information is determined to be properly classified under the Executive Order's guidelines, it is exempt from the FOIA. Besides providing for judicial review in an Exemption 1 FOIA dispute, the 1974 amendments further enhanced public access by requiring agencies to segregate and release nonexempt information from a record that contains exempt information.<sup>102</sup> Congress made a point of

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Order No. 12,065, 3 C.F.R. 190 (1978). In addition, Carter ordered that all classified documents and materials were to be automatically declassified after six years. President Reagan departed sharply from President Carter's stance on classification and issued an executive order in 1982 that enlarged classification authority. Exec. Order No. 12,356, 3 C.F.R. 166 (1982). Reagan created new classification categories, and under his administration's policy, it was presumed that in cases of reasonable doubt, information should be classified. *See id.* In addition, agencies classifying information were not required, as they had been under President Carter, to balance the need for security against the public's interest in disclosure. Finally, the Reagan Administration standard for deciding the "confidential" classification was relaxed from Carter's "identifiable damage to national security" to a reasonable expectation that damage would take place. Exec. Order No. 12,356, 3 C.F.R. 166 (1982). The George H. W. Bush Administration later followed this policy favoring classification.

The 1995 Clinton Executive Order on classification was the first issued since 1982, and addressed complaints that extensive overclassification of records was crippling the ability of the press, scholars, researchers and federal agencies to understand important national security matters. *See* Rebecca Daugherty, *President Bush Broadens Classification Rules*, THE NEWS MEDIA & THE LAW, Spring 2003, at 16. Clinton's classification rules required agencies to provide more detail describing the potential damage to national security in order to withhold records. To decide declassification, Clinton Executive Order 12,958 directs agencies to apply a balancing test to determine "whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure." Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995).

President George W. Bush signed Executive Order No. 13,292, which keeps in place, but amends Clinton Executive Order 12,958. While the Carter, Reagan-Bush and Clinton administrations issued new executive orders, replacing previous orders, the George W. Bush Administration did not, keeping Clinton's Executive Order No. 12,958 largely in effect. *See* Exec. Order 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) (George W. Bush Admin.); Exec. Order 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995) (William J. Clinton Admin.). Bush's amendments to Clinton's Executive Order made relatively few changes that will affect FOIA Exemption 1. One key change removes language ordering that information be declassified if there is "significant doubt" that disclosure could harm national security. *See* Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003). Rebecca Daugherty of Reporters Committee for Freedom of the Press noted that the Clinton order, at least on paper, had reversed a long-standing unwritten policy of "if in doubt, don't give it out" that had resulted in unwieldy stores of classified information. *See* Daugherty, *President Bush Broadens Classification Rules*, at 16. In regard to classification, the Bush Executive Order makes it easier for the government to keep documents classified because the order delays by three years the release of declassified records dating from 1978 or earlier. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003). This provision amends Clinton's Executive Order, which eased the declassification process. The Bush Executive Order also, for the first time, gives the vice president the authority to classify information. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003).

102. 5 U.S.C. § 552(a)(4)(B) (2000). *See also* FOIA GUIDE *supra* note 39, at 122-23.

emphasizing that this segregation-and-disclosure requirement applied to Exemption 1.<sup>103</sup>

## 2. Congress Reins In Agency Discretion

Congress significantly revised the FOIA again in 1976. This time, lawmakers amended Exemption 3<sup>104</sup> for the purpose of reining in agency discretion to withhold information.<sup>105</sup> One of the central issues in *CIA v. Sims* concerned the CIA's use of Exemption 3 to refuse a FOIA request.<sup>106</sup> Under FOIA Exemption 3, agencies can refuse a FOIA request for information if that information is shielded from disclosure under any other federal statutes.<sup>107</sup> Exemption 3's legislative history shows that—like Exemption 1—it was amended by Congress explicitly to enhance the FOIA's general philosophy of full disclosure and provide a check on executive branch authority to withhold information.<sup>108</sup>

In its original 1966 language, Exemption 3 simply said the FOIA did not apply to matters “specifically exempted from disclosure by statute.”<sup>109</sup> This language was amended in 1976 with the addition of a two-part test that allows an agency to cite a statute as a withholding authority, provided that the statute's plain text meaning (1) allows no discretion on the part of the agency, and (2) establishes specific criteria for withholding or makes clear exactly what kinds of materials can be withheld.<sup>110</sup>

Like the 1974 revision to Exemption 1, the 1976 amendment to Exemption 3 also came in the aftermath of a Supreme Court FOIA decision to which Congress objected. In *Administrator, FAA v. Robertson* in 1975,<sup>111</sup> the issue before the Court concerned whether a Federal Aviation Administration decision to withhold documents was authorized under the secrecy provisions of the Federal Aviation Act

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103. The D.C. Circuit explicitly emphasized that the 1974 segregation-and-disclosure rule also applies to records withheld under Exemption 1. See *Oglesby v. United States Dep't of the Army*, 79 F.3d 1172, 1180-81 (D.C. Cir. 1996); *Krikorian v. Dep't of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993).

104. 5 U.S.C. § 552(b)(3) (2000).

105. H.R. REP. NO. 94-880, pt.1, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2204-05. See also *Sims v. CIA (Sims I)*, 642 F.2d 562, 567 (D.C. Cir. 1980).

106. *Sims*, 471 U.S. 159 (1985).

107. 5 U.S.C. § 552(b)(3) (2000). See FOIA GUIDE, *supra* note 39, at 154.

108. H.R. REP. NO. 94-880, pt.1, at 23, *reprinted in* U.S.C.C.A.N. 2204-05. See also *Sims I*, 642 F.2d at 567.

109. 5 U.S.C. § 552(b)(3) (1966).

110. 5 U.S.C. § 552(b)(3) (2000).

111. *FAA v. Robertson*, 422 U.S. 255 (1975).

of 1958.<sup>112</sup> This suit was initiated after the FAA rejected a consumer group's request to release agency reports on the operations and maintenance performance of commercial aircraft. The FAA withheld the information, asserting that Section 1104 of the FAA Act of 1958<sup>113</sup> qualified as a withholding statute under Exemption 3. This section allowed the administrator to withhold data when, in the administrator's judgment, disclosure would adversely affect the agency and is not required in the public interest.<sup>114</sup>

The U.S. District Court for the District of Columbia ruled against the government, holding that Section 1104 of the Federal Aviation Act did not qualify as an exempting statute under Exemption 3.<sup>115</sup> The D.C. Circuit affirmed the district court's decision, reasoning that the discretionary nature of Section 1104 and its vague public interest standard were insufficient for it to qualify as a specific exempting statute under the meaning of Exemption 3.<sup>116</sup> On appeal, however, the Supreme Court reversed the appellate court ruling.<sup>117</sup> The majority opinion, written by Chief Justice Warren Burger, held that the appeals court misinterpreted Exemption 3. The Court upheld the FAA Administrator's broad discretion to withhold records on the grounds that a statute need not precisely identify specific categories of data that may be withheld in order to qualify as a withholding statute under Exemption 3.<sup>118</sup> Justices William O. Douglas and William J. Brennan dissented, supporting the lower courts' view that Section 1104's discretionary nature and vague public interest standard gave the agency more discretion than permissible under the FOIA.<sup>119</sup>

Congress nullified the *Robertson* decision in the 1976 FOIA amendments by revising Exemption 3 specifically to limit an agency executive's discretion to withhold information.<sup>120</sup> Echoing the dissenting opinion by Justice Douglas, legislators said the Court's broad construction of Exemption 3 gave too much discretion to agency officials and conflicted with FOIA policy.<sup>121</sup> Congress declared that the Supreme Court interpreted Exemption 3 in a way that

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112. *Id.* at 265-67, citing 49 U.S.C. § 1504 (1982).

113. 49 U.S.C. § 1504 (1982).

114. *Robertson*, 422 U.S. at 259.

115. *Robertson v. Butterfield*, No. 71-1970 (D.C. Cir. Oct. 31, 1972).

116. *Robertson v. Butterfield*, 498 F.2d 1031, 1036 (D.C. Cir. 1974).

117. *Robertson*, 422 U.S. at 263.

118. *Id.* at 266-67.

119. *Id.* at 268 (Douglas, J., & Brennan, J., dissenting).

120. H.R. REP. NO. 94-880, pt.1, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 2204-05.

121. *Id.*

granted the FAA Administrator “*carte blanche* to withhold any information he pleases.”<sup>122</sup>

The legislative histories of Exemptions 1 and 3 thus show that Congress clearly reiterated its FOIA mandate for a broad policy of full disclosure in 1974 and 1976, going so far as to admonish the Supreme Court by nullifying two rulings that conflicted with Congress’ intent.<sup>123</sup> This policy stands in sharp relief against the objectives of the National Security Act of 1947,<sup>124</sup> which was the statutory basis cited by the CIA to justify withholding in *CIA v. Sims*.<sup>125</sup>

### **B. The National Security Act of 1947**

Passed by Congress after the Second World War, the National Security Act mandated a major reorganization of the foreign policy and military establishments of the federal government.<sup>126</sup> The law was enacted in the wake of harsh congressional criticism over the deficient performance of U.S. intelligence operations before the attack on Pearl Harbor and during the ensuing war.<sup>127</sup> A 1947 Senate report that accompanied the legislation for the National Security Act said the U.S. war effort “disclosed certain fundamental weaknesses in our security structure which should be remedied while their details are fresh in mind.”<sup>128</sup> The report pointed to this nation’s “slow and costly mobilization” and “limited intelligence of the designs and capacities of our enemies” as convincing evidence that the United States “would be imperiled were we to ignore the costly lessons of the war and fail to . . . prevent the recurrence of these defects.”<sup>129</sup>

The National Security Act created the National Security Council and the CIA in order to improve the nation’s ability to collect and evaluate intelligence information not only during war but also during peacetime.<sup>130</sup> The CIA grew out of the World War II Office of Strategic Services and formerly was known as the Central Intelligence Group, which was one of a number of small decentralized postwar

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122. *Id.*

123. See *Robertson*, 422 U.S. 255, *EPA v. Mink*, 410 U.S. 73 (1973).

124. 50 U.S.C. § 403(3), formerly codified at 50 U.S.C. § 404(d)(3).

125. 471 U.S. 159, 167-68 (1985).

126. S. REP. NO. 80-239, at 2-3 (1947). See also H.R. REP. NO. 80-961, at 2-3 (1947).

127. S. REP. NO. 80-239, at 2-3. See also H.R. REP. NO. 80-961, at 2-3.

128. S. REP. NO. 80-239, at 2.

129. *Id.*

130. See H.R. REP. NO. 80-961, at 2-3 (1947).

intelligence groups.<sup>131</sup> The National Security Act authorized the CIA to be the single organization for gathering and analyzing intelligence related to national defense. In hearings on the National Security Act, General Hoyt Vandenberg, former director of the Central Intelligence Group, testified that reorganization of all intelligence operations under the broad and centralized authority of the CIA was necessary for maximum intelligence effectiveness.<sup>132</sup> “It is almost universally agreed that the collection of clandestine intelligence must be centralized someplace, because if it is disseminated among several organizations without one head, the agents who are operating expose each other.”<sup>133</sup>

A key provision in the National Security Act, which emerged as the overarching issue in *CIA v. Sims*, grants the Director of Central Intelligence the authority to protect “intelligence sources and methods” from unauthorized disclosure.<sup>134</sup> Neither the National Security Act’s plain meaning nor its legislative history defined “intelligence sources” or provided clarifying language for this term.<sup>135</sup> Still, the statute reflects clear congressional intent that the law was meant to enable the CIA to gather intelligence from a wide variety of sources.<sup>136</sup> For example, Allen W. Dulles, who helped found the Agency and served as its director from 1953 to 1961, testified during congressional hearings on the National Security Act that intelligence sources are widely diverse.<sup>137</sup> “We cannot get our intelligence solely from our diplomatic people and our military and naval attaches or from the agents that a Central Agency should send out,” Dulles

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131. *Id.* In addition, the National Security Act also merged the War Department and Navy Department into a single Department of Defense under the Secretary of Defense, who also directed the newly created Department of the Air Force. S. REP. NO. 80-239, at 3-4 (1947). *See also* The 9/11 COMMISSION REPORT, *supra* note 1, at 89.

132. *Hearing Before the Comm. on Expenditures in the Exec. Dep'ts on H.R. 2319 (National Security Act of 1947)*, 80th Cong., 5-6 (1947) (testimony of General Hoyt Vandenberg).

133. *Id.*

134. *Sims*, 471 U.S. at 167-68, *citing* 50 U.S.C. § 403(d)(3).

135. 50 U.S.C. § 403(3), formerly codified at 50 U.S.C. § 404(d)(3). The absence of a definition for “intelligence sources” in Section 102(d)(3) of the National Security Act presented the thorniest problem in the eight-year-long *Sims* court fight. This issue will be discussed in detail later in the article.

136. *Sims*, 471 U.S. at 170-72.

137. *Hearing Before the Comm. on Expenditures in the Exec. Dep'ts on H.R. 2319 (National Security Act of 1947)*, 80th Cong., 22 (July 27, 1947) (testimony of Allen Dulles). *See also Sims*, 471 U.S. at 171.

said.<sup>138</sup> He dispelled the notion of the classic "secret agent" as depicted in films and novels, saying, "American businessmen and American professors and Americans of all types and descriptions who travel around the world are one of the greatest repositories of intelligence that we have."<sup>139</sup> His remarks were echoed by Rep. James W. Wadsworth, who said the function of the CIA is "to constitute itself as a gathering point for information coming from all over the world through all kinds of channels,"<sup>140</sup> and Rep. Hale Boggs, who testified that the CIA gathers and analyzes information, "from wherever we can get it."<sup>141</sup>

In addition to citing the National Security Act of 1947 in its *CIA v. Sims* analysis, the Supreme Court also turned to an amendment to the act, the Central Intelligence Agency Information Act of 1984.<sup>142</sup> This amendment exempted specifically defined CIA "operational files" from disclosure, but left remaining files subject to the FOIA.<sup>143</sup> According to the House report accompanying the legislation, operational files consist of:

records which, after line-by-line security review, almost invariably prove not to be releasable under the FOIA.... A decade of experience has shown that certain specifically identifiable CIA operational records systems, containing the most sensitive information directly concerning intelligence sources and methods,

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138. *Hearing Before the Comm. on Expenditures in the Exec. Dep'ts on H.R. 2319 (National Security Act of 1947)*, 80th Cong., 22 (July 27, 1947) (testimony of Allen Dulles). See also *Sims*, 471 U.S. at 171.

139. *Hearing Before the Comm. on Expenditures in the Exec. Dep'ts on H.R. 2319 (National Security Act of 1947)*, 80th Cong., 22 (July 27, 1947) (testimony of Allen Dulles). See also *Sims*, 471 U.S. at 171.

140. *Sims*, 471 U.S. at 171 n. 14.

141. *Id.*

142. *Id.* at 168 n. 11, 174 n. 19, 193, citing Pub. L. No. 98-477, 98 Stat. 2209-2212 (1984).

143. CIA Information Act, Pub. L. No. 98-477, 98 Stat. 2209 (1984), codified at 50 U.S.C. § 431. See also H.R. REP. NO. 98-726, at 4 (1984) (House Permanent Select Comm. on Intelligence), reprinted in 1984 U.S.C.C.A.N. 3742. The CIA Information Act defines "operational files" as:

(1) files of the Directorate of Operations which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements of information exchanges with foreign governments or their intelligence or security services; (2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and (3) Personnel files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources.

Pub. L. No. 98-477, 98 Stat. 2209 (1984), codified at 50 U.S.C. § 431.



inevitably contain few, if any, items which can be disclosed to FOIA requesters.<sup>144</sup>

Some examples of non-disclosable information contained in operational files include details about organizational structure, numbers of personnel assigned to certain functions, and personnel names, titles and salaries.<sup>145</sup>

The House report declared that these files were exempted in order to relieve the CIA from the time-consuming bureaucratic requirements for complying with certain FOIA requests that typically are rejected anyway, and to help reduce troublesome backlogs.<sup>146</sup> The legislative history of the CIA Information Act shows that the legislation was enacted principally because of years of prodding by the Agency, which wanted Congress to provide additional assurance that CIA sources will remain confidential.<sup>147</sup> In 1979, for example, CIA Deputy Director Frank Carlucci declared that the "total application of public disclosure statutes like the FOIA to the CIA is seriously damaging our ability to do our job."<sup>148</sup> The amendment's sponsors said the CIA's ability to serve the national interest depends on "the confidence of intelligence sources that their relationships with the CIA will be protected."<sup>149</sup> Legislators concluded that "current FOIA requirements create greater burdens and risks for the CIA than is necessary to achieve the essential goal of preserving full access to significant information."<sup>150</sup>

The CIA Information Act of 1984 is especially relevant to this analysis, as will be demonstrated later in this article, because unlike the National Security Act, Congress passed the CIA Information Act after the FOIA was enacted. An examination of the 1984 legislation shows that it explicitly recognizes CIA disclosure obligations under the FOIA.<sup>151</sup>

### III. *CIA v. Sims*—Carte Blanche Secrecy

The clash between the legitimate and competing policy objectives of the FOIA and the National Security Act, which pit

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144. H.R. REP. NO. 98-726, at 4-5, *reprinted in* 1984 U.S.C.C.A.N. 3742-3743.

145. *See Sims*, 471 U.S. at 193 (Marshall, J., concurring).

146. H.R. REP. NO. 98-726, at 4, *reprinted in* 1984 U.S.C.C.A.N. 3742.

147. *Id.*

148. H.R. REP. NO. 98-726, at 6 (1984) (testimony by Frank Carlucci to the House Permanent Select Comm. on Intelligence), *reprinted in* 1984 U.S.C.C.A.N. 3744.

149. H.R. REP. NO. 98-726, at 9, *reprinted in* 1984 U.S.C.C.A.N. 3747.

150. *Id.*

151. *See* CIA Information Act, Pub. L. No. 98-477, 98 Stat. 2209-2212 (1984).

transparency against secrecy, lies at the heart of *CIA v. Sims*.<sup>152</sup> In *Sims*, secrecy prevailed. As a result, the CIA has been exempt for the last two decades from releasing virtually any information that the Director of Central Intelligence merely contends may qualify as, or compromise, a source of intelligence.<sup>153</sup> Under this sweeping *Sims* standard, the Court established that the CIA:

- Need not go through a classification process to withhold information.<sup>154</sup>
- Is not subject to judicial review to confirm that purportedly classified information was properly classified under an Executive Order.<sup>155</sup>
- Can withhold unclassified information, regardless of how dated, how seemingly innocuous or how trivial it may be.<sup>156</sup>
- Need not assert that a disclosure conceivably could affect national security, nor even argue that it could reasonably be expected to cause identifiable damage.<sup>157</sup>
- Is not required to show that an “intelligence source” had requested confidentiality.<sup>158</sup>

The facts in *CIA v. Sims* concerned a FOIA request for records detailing a series of CIA-financed psychological experiments conducted in the United States between 1953 and 1966.<sup>159</sup> Code-named Project MKULTRA, the experiments were undertaken to counter perceived Soviet and Chinese advances in brainwashing and interrogation techniques.<sup>160</sup> At least eighty private and public research facilities—including major American universities, hospitals and prisons<sup>161</sup>—and 185 researchers participated in the then-secret project

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152. 471 U.S. 159 (1985).

153. See, e.g., *Assassination Archives and Research Center v. CIA*, 334 F.3d 55 (D.C. Cir. 2003); *Center for National Security Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003); *Minier v. CIA*, 88 F.3d 796 (9th Cir. 1996); *Maynard v. CIA*, 986 F.2d 547 (1st Cir. 1993); *Sullivan v. CIA*, 992 F.2d 1249 (1st Cir. 1993); *Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992); *Knight v. CIA*, 872 F.2d 660 (5th Cir. 1989); *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990); *Rubin v. CIA*, 01 CIV. 2274 (DLC), LEXIS 19413 (S.D.N.Y. Nov. 30, 2001); *Federation of American Scientists v. CIA*, 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 12, 1999); *U.S. Student Ass'n v. CIA*, 620 F.Supp. 565 (D.D.C. 1985).

154. *Sims*, 471 U.S. at 183-84 (Marshall, J., concurring).

155. *Id.* at 190 (Marshall, J., concurring).

156. *Id.* at 178.

157. *Id.* at 190 (Marshall, J., concurring).

158. *Id.*

159. *Id.* at 161-62.

160. *Sims*, 471 U.S. at 161-62.

161. Included among the universities that were identified are Harvard, Princeton,

in which unwitting subjects were observed after they were given experimental drugs such as LSD and mescaline.<sup>162</sup> In some cases, subjects were picked up in bars by CIA-hired prostitutes, given drugs and then taken for observation to safehouses in New York and San Francisco equipped with recording devices and two-way mirrors.<sup>163</sup> As a result of these experiments and illegal activities, at least two persons died, and others suffered impaired health.<sup>164</sup>

Information about the MKULTRA project and other questionable CIA activities, such as domestic spying during the socially turbulent Vietnam War years, was leaked to the press and widely reported.<sup>165</sup> Congress subsequently launched a wide-ranging investigation into CIA operations. It was while these hearings were taking place that Public Citizen, a Ralph Nader organization, requested the CIA's MKULTRA records under the FOIA. Public Citizen attorney John Cary Sims asked the CIA to disclose the names of the research facilities, the identities of the researchers, and the details of the project's research contracts and grants.<sup>166</sup> The CIA

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Cornell, Massachusetts Institute of Technology, University of Michigan and Stanford University School of Medicine. *Sims v. CIA*, 479 F. Supp. 84, 85 n. 2 (1979).

162. *Sims*, 471 U.S. at 161-62.

163. MARTIN A. LEE AND BRUCE SHLAIN, *ACID DREAMS: THE CIA, LSD, AND THE SIXTIES REBELLION* 32 (1985).

164. *Sims*, 471 U.S. at 159-60, 162 n.4. See also LEE & SHLAIN, *supra* note 163, at 29-31. These CIA psychological tests were an illegal violation of the charter that established the Agency. Under the National Security Act, the CIA was specifically denied powers of domestic intelligence gathering, specifically, "no police, subpoena, or law enforcement powers or internal security functions." Pub. L. No. 80-253, § 102(d)(3), codified at 50 U.S.C. § 403-3(d)(1). See also THE 9/11 COMMISSION REPORT, *supra* note 1, at 89.

165. News reports that the CIA had engaged in illegal activities and abuses, such as the MKULTRA psychological experiments and domestic spying on Vietnam War opponents, were published in late 1974 by *The New York Times*. See, e.g., Seymour Hersh, *Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at A1, A16. Additional news reports by Hersh and others on allegations of CIA abuses prompted a series of congressional investigations and hearings, beginning with an investigation by an executive committee chaired by Vice President Nelson Rockefeller. The resulting Rockefeller Commission Report in 1975 disclosed details of the CIA's covert domestic operation into brainwashing and behavior-modification techniques between 1953 and 1966. As a result of the report, Sen. Frank Church was named to head a Senate committee to investigate those and other allegations further. *Sims v. CIA* (*Sims I*), 642 F.2d 562, 564 (D.C. Cir. 1980). See also BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* 42 (1999). The illegal CIA activities disclosed by the Rockefeller Commission and Church Committee have been widely reported over the years in the news media and numerous secondary sources. For a highly readable and detailed account of the CIA's MKULTRA misdeeds, see LEE & SHLAIN, *supra* note 163.

166. *Sims*, 471 U.S. at 162-64. A second respondent, Sidney M. Wolfe, M.D., was director of Public Citizen Health Research Group. *Id.* at 162-63.

disclosed the names of fifty-nine research facilities and the terms of the contracts, but refused to name twenty-one other facilities and kept secret the identities of all the project's researchers.<sup>167</sup>

Public Citizen sued to obtain the records, setting into motion an eight-year-long court fight that ended in 1985 when the Supreme Court ruled that the CIA could withhold the information because the National Security Act<sup>168</sup> granted the Director of Central Intelligence broad and unreviewable discretion to safeguard "intelligence sources and methods" from unauthorized disclosure.<sup>169</sup> That decision was based in great part on a Supreme Court-crafted definition of "intelligence sources" because, as noted earlier, Congress did not define the term in the National Security Act.<sup>170</sup> The precise meaning of exactly who or what qualified as an "intelligence source" surfaced as the salient issue throughout the lengthy and contentious *Sims* proceedings.<sup>171</sup>

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167. *Id.* at 163. It was revealed during the Church Committee Hearings that in 1973 CIA Director Richard Helms had ordered all MKULTRA records and documents destroyed to avoid their ever being disclosed. However, in a bizarre twist, a CIA staff member discovered about 8,000 pages of documents that inadvertently escaped destruction. The information sought by attorney Sims was contained in these records. *Id.* at n. 5. See also JAMES X. DEMPSEY, *The CIA and Secrecy*, in *A CULTURE OF SECRECY: THE GOVERNMENT VERSUS THE PEOPLE'S RIGHT TO KNOW* 41-42 (Athan G. Theoharis ed., University Press of Kansas 1998).

168. 50 U.S.C. § 403(3).

169. See *Sims*, 471 U.S. at 174-77.

170. *Id.*

171. *CIA v. Sims* had a long history before reaching the Supreme Court. The case was initially argued before the U.S. District Court for the District of Columbia. *Sims v. CIA*, 479 F. Supp. 84 (D.D.C. 1979). District court decisions were appealed twice to two separate panels of the U.S. Court of Appeals for the District of Columbia Circuit in suits commonly referred to as *Sims I* and *Sims II*. *Sims v. CIA (Sims I)*, 642 F.2d 562 (D.C. Cir. 1980) & *Sims v. CIA (Sims II)*, 709 F.2d 95 (D.C. Cir. 1983).

The definition of "intelligence sources" was the focus of each decision in this series of opinions. The D.C. District Court held that the names of institutions and researchers could not be withheld because they were not "intelligence sources" within the meaning of Section 102(d)(3) of the National Security Act of 1947. 50 U.S.C. § 403(d)(3). The district court reasoned that in order for the CIA director to declare the researchers to be "intelligence sources," there must be "clear, non-discretionary guidelines to test whether an intelligence source is involved in a particular case." *Sims*, 479 F.Supp. at 87-88. On appeal, the D.C. Circuit held that the district court's analysis of Section 102(d)(3) lacked a coherent definition of "intelligence sources." In *Sims I*, the D.C. Circuit remanded the case to the district court for reconsideration based on a definition of "intelligence sources" crafted by the appellate court:

[A]n 'intelligence source' is a person or institution that provides, has provided or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

*Sims I*, 642 F.2d at 571. On remand, the district court held that the CIA should disclose the

### A. The Supreme Court Majority Opinion

*CIA v. Sims* reached the Supreme Court after the U.S. Court of Appeals for the District of Columbia Circuit defined an “intelligence source” to be someone who is promised confidentiality *and* whose information could not be obtained through other means.<sup>172</sup> Under this D.C. Circuit definition, the CIA would have been required to release the names of MKULTRA researchers who did not explicitly request confidentiality. Both the CIA and John Cary Sims appealed the decision to the Supreme Court; the Agency wanted to withhold all the names, and FOIA requester Sims wanted all the identities disclosed.

In the majority opinion written by Chief Justice Burger and joined by six justices, the Court framed two principal issues in *Sims v. CIA*.<sup>173</sup> First, the Court considered the threshold question of whether Section 102(d)(3) of the National Security Act, the provision that authorized the protection of “intelligence sources and methods,” qualified as a withholding statute under FOIA Exemption 3.<sup>174</sup> Second, the Court considered whether the MKULTRA researchers qualified as “intelligence sources” under Section 102(d)(3).<sup>175</sup> The Court’s discussion of whether Section 102(d)(3) qualified as a withholding statute covered only three pages<sup>176</sup> of the thirty-five page *Sims* opinion, but this brief discussion has had far-reaching consequences: The *Sims* Court majority decisively affirmed the CIA’s central argument that the National Security Act granted broad and unreviewable authority to the Director of Central Intelligence to protect “intelligence sources and methods” from unauthorized disclosure.<sup>177</sup>

To resolve the second issue—the definition of the term “intelligence sources”—the Court needed to decide several corollary questions: whether the term “intelligence sources,” contained in

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identities of those researchers who did not request confidentiality, thus complying with the prescribed definition of “intelligence source.” *Sims II*, 709 F.2d at 97. On a second appeal, the D.C. Circuit held that the district court incorrectly applied the definition of “intelligence sources.” *Sims II*, 709 F.2d at 98. In *Sims II*, the D.C. Circuit clarified that a researcher could be considered an “intelligence source” only if the researcher is promised confidentiality, and the information provided by the researcher could not be obtained through other means. *Id.* at 99-100. After the D.C. Circuit’s *Sims II* decision, both sides appealed to the Supreme Court. *Sims*, 471 U.S. 159 (1985).

172. *Sims II*, 709 F.2d at 99-100.

173. *Sims*, 471 U.S. at 167.

174. *Id.* at 167 & 177-81.

175. *Id.* at 167 & 175-77.

176. *Id.* at 166-68.

177. *Id.* at 177-81.

Section 102(d)(3) of the National Security Act,<sup>178</sup> was correctly defined by the D.C. Circuit;<sup>179</sup> whether the Project MKULTRA researchers would qualify as intelligence sources under Section 102(d)(3);<sup>180</sup> and whether disclosure of the requested information, such as researcher identities and research facilities, would reveal protected information.<sup>181</sup>

The Supreme Court objected to the D.C. Circuit's definition of "intelligence sources," reasoning that it was too narrowly drawn and consequently would result in disclosure of more information than should be made public.<sup>182</sup> In the Court's view, a narrow interpretation of "intelligence sources" ignores the practical necessities of intelligence gathering and the unique responsibilities of the Agency.<sup>183</sup> Burger said Section 102(d)(3) "may not be squared with any limiting definition."<sup>184</sup>

To keep informed of other nations' activities bearing on our national security, the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosure that would unnecessarily compromise the Agency's efforts.<sup>185</sup>

The Court thus rejected the appellate court's suggestion that the CIA director is authorized to protect intelligence sources only if such confidentiality is needed to obtain information that otherwise could not be acquired.<sup>186</sup> Had Congress so intended, Burger wrote, it would have drafted legislation that narrows the category of protected sources.<sup>187</sup> He noted, for example, that in Exemption 7 of the FOIA<sup>188</sup> and in the Privacy Act, Congress explicitly protected sources that provided information under a promise of confidentiality.<sup>189</sup>

Accordingly, the Court fashioned a new definition: "An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations . . . related to the

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178. 50 U.S.C. § 403(d)(3).

179. *Sims I*, 642 F.2d at 571.

180. *Sims*, 471 U.S. at 167.

181. *Id.* at 168.

182. *Id.* at 169-70.

183. *Id.* at 169.

184. *Id.*

185. *Id.*

186. *Sims*, 471 U.S. at 169.

187. *Id.*

188. *Id.*, citing 5 U.S.C. § 552(b)(7)(D). Exemption 7 exempts certain law enforcement records from disclosure.

189. *Id.*, citing 5 U.S.C. § 552a(k)(2) & (5).

Agency's intelligence function."<sup>190</sup> Burger said the Supreme Court's definition of "intelligence sources" comports with the National Security Act's plain meaning and legislative history, which suggest a broad authority for the CIA director to protect all sources of intelligence information from disclosure.<sup>191</sup> In relying on this legislative history to support the Court's construction of "intelligence sources," Burger noted testimony from congressional hearings on the establishment of the CIA,<sup>192</sup> such as the aforementioned remarks by former CIA Director Dulles and Congress members Wadsworth and Boggs.<sup>193</sup> Burger said their testimony reflected the need for an "extraordinary diversity" of sources of information.<sup>194</sup>

Burger also pointed to the legislative history of the CIA Information Act of 1984<sup>195</sup> to support the CIA's use of Exemption 3 and Section 102(d)(3) of the National Security Act as grounds to withhold the requested information.<sup>196</sup> If potentially valuable intelligence sources believe the CIA will be unable to maintain their anonymity, Burger reasoned, many might refuse to supply information to the Agency.<sup>197</sup> "[F]orced disclosure of the identities of intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission," he wrote.<sup>198</sup> Burger argued that the government has a compelling interest in protecting not only secret information crucial to national security but also the appearance of confidentiality, which is essential to the effective operation of the CIA.<sup>199</sup> Burger cited testimony by Dulles, who said that even American citizens who freely supply intelligence information would "close up like a clam" unless they can count on the government for complete confidentiality.<sup>200</sup>

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190. *Id.* at 177. It is noteworthy that the source for this definition was the CIA itself. The original language for the CIA's proposed definition for "intelligence sources" can be found in Agency briefs filed with the D.C. Circuit in *Sims I*. 642 F.2d at 576 n.1.

191. *Sims*, 471 U.S. at 169-170, 173.

192. *Id.* at 171-72.

193. *See supra* notes 136-141 and accompanying text.

194. *Sims*, 471 U.S. at 171.

195. CIA Information Act, Pub. L. No. 98-477, 98 Stat. 2009 (1984).

196. *Sims*, 471 U.S. at 168 n.11 & 174 n.19.

197. *Id.* at 169.

198. *Id.* at 175.

199. *Id.*, citing *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (holding that the CIA can enforce a nondisclosure agreement with a former CIA official who wrote a book about the Vietnam War containing nonclassified information about the Agency).

200. *Sims*, 471 U.S. at 175.

Throughout its analysis of the issues in *Sims*, the majority opinion repeatedly emphasized the importance of showing “great deference” to CIA discretion, particularly decisions made by the Director of Central Intelligence to withhold information under the FOIA.<sup>201</sup> In the first place, Burger wrote that the Director of Central Intelligence is specifically granted broad powers through statutory authority, namely Section 102(d)(3) of the National Security Act.<sup>202</sup> Furthermore, the granting of such power to the CIA chief is good policy because the director is the only person familiar with the whole intelligence picture and is thus best suited to determine whether individual bits of information—although not obviously important by themselves—can, in their aggregate, reveal intelligence sources and methods.<sup>203</sup> “The decisions of the Director, who must of course be familiar with ‘the whole picture,’ as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake,”<sup>204</sup> Burger wrote. He explicitly rejected the idea that judges should have the power of *de novo* review in FOIA litigation for CIA-held information.<sup>205</sup> Burger asserted that *de novo* review in CIA cases poses inherent dangers because judges have “little or no background in the delicate business of intelligence gathering.”<sup>206</sup>

## B. The Marshall Concurrence

In a concurrence to *Sims*, written by Justice Thurgood Marshall and joined by Justice William J. Brennan, the two jurists agreed with the outcome of the opinion: The definition of “intelligence sources” crafted by the Court of Appeals for the District of Columbia Circuit was too narrow and limited, and to apply it to the *Sims* case would release more material than should be disclosed.<sup>207</sup> However, they objected in strongly worded terms with the majority on two important issues. First, the concurring justices argued that the Court majority’s broad definition of “intelligence sources” exceeded the plain meaning and legislative history of “any congressional act,” and that it conflicted directly with the FOIA’s broad mandate for disclosure.<sup>208</sup>

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201. *Id.* at 179.

202. *Id.* at 170.

203. *Id.* at 178.

204. *Id.* at 179.

205. *Id.* at 176.

206. *Id.*

207. *Sims*, 471 U.S. at 181-82, 194 (Marshall, J., concurring).

208. *Id.* at 182 (Marshall, J., concurring).



Second, they argued that the Court majority should have ordered the CIA to justify withholding under Exemption 1, and not under Exemption 3.<sup>209</sup> They contended that by relying on Exemption 3, the CIA “cleverly evaded” judicial *de novo* review,<sup>210</sup> as required by Exemption 1, and thus thwarted an important check created by Congress specifically to limit federal agency discretion in withholding decisions.<sup>211</sup>

Marshall acknowledged that the D.C. Circuit Court’s definition for “intelligence sources” was too narrow, but he asserted that the Supreme Court majority went to the other extreme.<sup>212</sup> He rejected the majority definition of “intelligence source,” contending that its broad construction improperly equates “intelligence source” with the broader term, “information source.”<sup>213</sup> Under the majority definition, he argued, even newspapers, road maps, and telephone books would fall under the Court’s definition of “intelligence sources,” thereby casting an unreviewable presumption of secrecy over an “expansive array of information” held by the CIA.<sup>214</sup>

According to Marshall, the term “intelligence source” does not have any single and readily apparent definition compelled by the plain language of Section 102(d)(3), as the majority justices contended.<sup>215</sup> He wrote that the legislative history of the National Security Act suggests only a congressional intent to protect individuals who might be harmed or silenced if they were identified.<sup>216</sup> “The heart of the issue is whether the term ‘intelligence source’ connotes that which is confidential or clandestine, and the answer is far from obvious,”<sup>217</sup> he wrote. Marshall offered a compromise definition, which he said comports with the statutory language and legislative history of the National Security Act while also falling within the congressionally imposed limits on the CIA’s exercise of discretion.<sup>218</sup> He interpreted “intelligence sources” to refer only to sources who provide information either on an expressed or implied

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209. *Id.* at 189-90 (Marshall, J., concurring).

210. *Id.* at 190 (Marshall, J., concurring).

211. *Id.* at 189 (Marshall, J., concurring).

212. *Id.* at 182 (Marshall, J., concurring).

213. *Sims*, 471 U.S. at 187 (Marshall, J., concurring). Burger wrote that even disclosure of “an obscure but publicly available Eastern European technical journal could thwart the Agency’s efforts to exploit its value as a source of intelligence information.” *Id.* at 177.

214. *Id.* at 191 (Marshall, J., concurring).

215. *Id.* at 187 (Marshall, J., concurring).

216. *Id.* at 187 (Marshall, J., concurring).

217. *Id.* at 186 (Marshall, J., concurring).

218. *Id.*

promise of confidentiality.<sup>219</sup> Marshall defended his definition, arguing that it would meet the CIA's concerns about confidentiality because it would protect not only "intelligence sources" but also protect the kind of information that would lead to identifying such a source.<sup>220</sup>

The Marshall concurrence also parted ways with the majority over the CIA's use of Exemption 3 to withhold the requested records. Because the CIA was allowed to sidestep Exemption 1, Marshall said the Agency circumvented requirements "carefully crafted" by Congress to "limit the Agency's discretion."<sup>221</sup> In the view of Marshall and Brennan, the CIA should have cited Exemption 1,<sup>222</sup> the national security exemption, to withhold the Project MKULTRA information.<sup>223</sup> Marshall pointed out that Exemption 1 would have allowed for the same outcome—the withholding of the researchers' identities—while at the same time recognizing limits on Agency discretion.<sup>224</sup> Exemption 1 imposes two restrictions on a federal agency's discretion to withhold a record.<sup>225</sup> The first check is procedural in that an agency is not the judge of what can be classified; this determination is made by each presidential administration under an Executive Order.<sup>226</sup> Second, the judiciary has an important checking role through *de novo* review.<sup>227</sup> Under this power of judicial review in Exemption 1 cases, the courts have the authority to confirm

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219. *Id.*

220. *Id.*

221. *Id.* at 189 (Marshall, J., concurring).

222. 5 U.S.C. § 552(b)(1) (2000).

223. When the case was first heard by the U.S. District Court for the District of Columbia, the court held that the names of institutions and researchers could not be withheld because they were not "intelligence sources" within the meaning of Section 102(d)(3) of the National Security Act of 1947. *Sims v. CIA*, 479 F. Supp. 84, 87-88 (D.D.C. 1979). However, District Judge Louis F. Oberdorfer, who wrote the opinion, said that the names of the researchers could be classified for national security reasons under Exemption 1 to withhold their identities. Although the court issued its opinion on Aug. 7, 1979, Oberdorfer set forward the effective date of the ruling to Oct. 1, 1979 to give the CIA time to classify the requested information so that it could be withheld under the national security exemption. Oberdorfer indicated his willingness to reconsider the CIA's decision to withhold the MKULTRA information if the Agency claimed Exemption 1 protection. *Id.* at 87-88. However, the CIA stuck with its Exemption 3 strategy throughout the appeals process.

224. Marshall observed that under President Ronald Reagan's Executive Order on classification, in effect at the time, "the Agency need make but a limited showing to a court to invoke Exemption 1 for that material." *Sims*, 471 U.S. at 190 n. 6 (Marshall, J., concurring), *citing* Exec. Order No. 12356, 3 CFR 166 (1983).

225. 5 U.S.C.S. § 552(b)(1) (1989).

226. 5 U.S.C. § 552(b)(1).

227. 5 U.S.C. § 552(b)(1).

that records asserted to be classified were classified according to guidelines established by an Executive Order.<sup>228</sup>

Marshall observed that Exemption 1 properly cloaks "classes of information that warrant protection, as long as the government proceeds through a publicly issued, congressionally scrutinized and judicially enforced executive order."<sup>229</sup> He characterized the national security exemption as the keystone of a congressional system that balances deference to the executive branch's interest in maintaining secrecy with continued oversight by the judicial and congressional branches of government.<sup>230</sup> "Congress, it is clear, sought to assure that the government would not operate behind a veil of secrecy, and it narrowly tailored the exceptions to the fundamental goal of disclosure," Marshall wrote.<sup>231</sup> The Marshall-Brennan concurrence concluded, therefore, that the *Sims* Court majority allowed the CIA to evade and undermine congressionally imposed requirements to constrain Agency discretion under the "carefully crafted balance embodied in Exemption 1."<sup>232</sup>

#### IV. *Sims* as Precedent

Although the *Sims* Court majority gave the Director of Central Intelligence sweeping and uncurbed discretion to withhold documents and records over a boundless class of information,<sup>233</sup> some lower courts have expressed their disagreement with the Supreme Court ruling.<sup>234</sup> For example, the U.S. Court of Appeals for the Ninth Circuit observed that the result of denying a FOIA request for an unclassified CIA record may well be contrary to what Congress intended.<sup>235</sup> The Ninth Circuit noted that a congressional report, issued only one year before the Court decided *Sims*, stated that "the FOIA has 'played a vital part in maintaining the American people's faith in their government, and particularly in agencies like the CIA.'"

228. 5 U.S.C. § 552(a)(4)(B) (2000). "(T)he court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section." 5 U.S.C. § 552(a)(4)(B). See also H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6290.

229. *CIA v. Sims*, 471 U.S. 159, 183 (1985) (Marshall, J., concurring).

230. *Id.*

231. *Id.* at 182 (Marshall, J., concurring), *citing* S. REP. NO. 89-813, at 10 (1965).

232. *Id.* at 189-90 (Marshall, J., concurring).

233. *Id.* at 191-92 (Marshall, J., concurring).

234. See, e.g., *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992); *Knight v. CIA*, 872 F.2d 660, 664 (5th Cir. 1989).

235. *Hunt*, 981 F.2d at 1120.

Whether or not that was actually the case at one time, it certainly is not true now, at least insofar as the CIA is concerned. . . . [N]othing in statute or case precedent permits us to reach a different result than *Sims* and the other cases command.”<sup>236</sup> And The U.S. Court of Appeals for the Fifth Circuit observed that under *Sims*, lower courts are constrained from ruling in favor of FOIA challenges when it comes to CIA withholding decisions: “[o]nce the DCI makes that [nondisclosure] determination, the Supreme Court effectively held, the matter is beyond the purview of the courts.”<sup>237</sup> In other words, the lower courts recognized the importance of the FOIA but had no choice but to follow *Sims*.

Over the last twenty years the influence of *Sims* as precedent has blocked access to CIA-held information in a long line of cases that cover a variety of issues of public interest.<sup>238</sup> Since 2001, for example, decisions by three appellate courts and one district court have upheld CIA decisions to withhold information of news value and public interest,<sup>239</sup> of historical importance,<sup>240</sup> of commercial and business interest<sup>241</sup> and of scholarly-research value.<sup>242</sup>

In the most recent case to date, the U.S. Supreme Court in 2004 let stand a decision by the D.C. Circuit that relied on *Sims* to permit the government to withhold basic information on persons detained after the September 11, 2001, terrorist attacks, including their names, their attorneys’ names, dates of arrest or release, locations of arrest and detention, and reasons for detention.<sup>243</sup> In *Center for National Security Studies v. Dep’t of Justice*, the government cited *Sims* at least eleven times as the legal authority to withhold information on the

236. *Id.*, citing H.R. REP. NO. 98-477, at 9 (1984), reprinted in 1984 U.S.C.C.A.N. 3791, 3747.

237. See *Knight v. CIA*, 872 F.2d 660, 664 (5th Cir. 1989).

238. See *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379, at \*14 (N.D. Tex. Feb. 26, 1999), *aff’d per curiam*, 208 F.3d 1007 (5th Cir. 2000), *cert. denied*, 531 U.S. 872 (2000); *Assassination Archives and Research Ctr. v. CIA*, 334 F.3d 55 (D.C. Cir., 2003); *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004); *Minier v. CIA*, 88 F.3d 796 (9th Cir. 1996); *Maynard v. CIA*, 986 F.2d 547 (1st Cir. 1993); *Sullivan v. CIA*, 992 F.2d 1249 (1st Cir. 1993); *Hunt*, 981 F.2d 1116; *Knight*, 872 F.2d 660; *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990); *Rubin v. CIA*, 01 CIV. 2274 (DLC), 2001 U.S. Dist. LEXIS 19413 (S.D.N.Y. Nov. 30, 2001); *Fed’n of Am. Scientists v. CIA*, No. 98-2107, 1999 U.S. Dist. LEXIS 18135 (Nov. 15, 1999); *U.S. Student Ass’n v. CIA*, 620 F. Supp. 565 (D.D.C. 1985).

239. See *Ctr. for Nat’l Sec. Studies*, 331 F.3d 918.

240. See *Assassination Archives*, 334 F.3d 55.

241. See *Arabian Shield*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379, at \*1.

242. See *Rubin*, 01 CIV. 2274 (DLC), 2001 U.S. Dist. LEXIS 19413, at \*1.

243. *Ctr. for Nat’l Sec. Studies*, 331 F.3d 918. See also Linda Greenhouse, *Justices Allow Policy of Silence on 9/11 Detainees*, N.Y. TIMES, Jan. 13, 2004, at A1.

detainees that had been obtained or held by the CIA.<sup>244</sup> This suit was filed to challenge the secrecy surrounding the arrest and detention of hundreds of people, mostly Muslim men, after the September 11 attacks.<sup>245</sup> The D.C. Circuit Court had affirmed a D.C. District Court decision upholding the Bush Administration's argument that to disclose a list of names would give terrorist organizations a "composite picture of the government investigation."<sup>246</sup> The D.C. Circuit majority said the "judiciary owes some measure of deference" to the executive in cases where national security is at stake.<sup>247</sup> Dissenting appeals judge David S. Tatel said the majority had "converted deference into acquiescence" by allowing the government to engage in a policy of blanket secrecy.<sup>248</sup>

In another FOIA case, the D.C. Circuit held in 2003 that the CIA did not have to release a 1962 compilation of biographies of important Cuban leaders.<sup>249</sup> In *Assassination Archives and Research Center v. CIA*, the appeals court accepted the CIA's argument that under FOIA Exemption 3, the Agency was not bound to comply with the disclosure requirements of the JFK Assassination Records Act (JFK Act) or the FOIA.<sup>250</sup> The appellate court affirmed the D.C. District Court decision and rejected arguments by the Assassination Archives and Research Center that the CIA needed to show why at least some portions of the compendium should not be disclosed. Nor was the appeals court moved by the plaintiff's assertions that the information about Cuban leaders in 1962 already had been disclosed (though not by the CIA) under the JFK Act.<sup>251</sup> Appeals judges upheld the CIA's argument that to reveal even the names of the individuals or the number of names contained in the compendium would "reveal CIA interest" and the "extent of the U.S. intelligence collection effort directed at Cuba in the 1960's."<sup>252</sup> The appellate court echoed the Supreme Court's central holding in *Sims*—that the National Security

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244. See *Ctr. for Nat'l Sec. Studies*, 331 F.3d 918. Center for National Security Studies focused principally on Exemption 7, the FOIA exemption for certain law enforcement records. 5 U.S.C. § 552(b)(7)(2000).

245. *Ctr. for Nat'l Sec. Studies*, 331 F.3d 918.

246. *Id.* at 928. This suit focused principally on Exemption 7, which permits the government to withhold certain law enforcement records. 5 U.S.C. § 552(b)(7).

247. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27.

248. *Id.* at 940 (Tatel, J., dissenting).

249. See *Assassination Archives and Research Ctr. v. CIA*, 334 F.3d 55 (D.C. Cir. 2003).

250. *Id.* at 58-59.

251. *Id.* at 59.

252. *Id.* at 58.

Act protected *all* CIA records from disclosure at the director's discretion. "Given our deference to the Agency's judgment on the matter," the court said, "we uphold the Agency's determination that disclosure of the compendium, even in light of the JFK Act disclosures, 'can reasonably be expected to lead to the disclosure of intelligence sources and methods.'"<sup>253</sup>

In *Arabian Shield Development Co. v. CIA*,<sup>254</sup> the U.S. Circuit Court of Appeals for the Fifth Circuit affirmed a Texas district court decision that the CIA could deny a request for records that may reveal the involvement of the CIA in the awarding of an oil production agreement with the former Yemen Arab Republic. The events leading to this suit began in the 1980s when Arabian Shield Development Co. and Hunt Oil Co. submitted competing bids for the agreement. The contract was awarded to Hunt Oil. Arabian Shield then filed a complaint with the Department of Justice because the company suspected that Hunt Oil had won the bid through bribery.<sup>255</sup> The complaint charged that Hunt Oil conspired with Yemeni officials in violation of the Foreign Corruption Practices Act. Arabian Shield sought records of communications among Hunt Oil principals, Yemeni officials and the CIA.<sup>256</sup> The Agency argued that the information was classified, but Arabian Shield countered that it was improperly classified because national security cannot be used to conceal information pertaining to the commission of a crime.<sup>257</sup> The appellate court held that the documents were properly classified. However, it also noted that regardless of whether the information was classified, "the unique nature of the Agency's mandate [under the National Security Act] gives it broad power to protect intelligence sources and methods."<sup>258</sup> Quoting *Sims*, the court said: "[i]t is the responsibility of the Director of Central Intelligence, not of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process."<sup>259</sup>

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253. *Id.* at 59.

254. *Arabian Shield v. CIA*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379, at \*14 (N.D. Tex. Feb. 26, 1999).

255. *Id.* at \*1.

256. *Id.* at \*2-3.

257. *Id.*

258. *Id.* at \*13.

259. *Id.*

In a case that departs somewhat from the hard-edged issues behind the U.S. war on terrorism, the Cuban revolution and Middle East oil rights, the CIA denied a request from a Columbia University doctoral student who inquired about the participation of famed British writers Stephen Spender and T.S. Eliot in a now-defunct CIA-financed cultural organization.<sup>260</sup> In its 2001 decision in *Rubin v. CIA*, the U.S. District Court for the Southern District of New York upheld the CIA's decision to neither confirm nor deny that it possessed records on any involvement in the Congress for Cultural Freedom, a CIA-funded organization that promoted anti-communist conferences, periodicals and events worldwide.<sup>261</sup> The student, Andrew Rubin, was a Ph.D. candidate in the Columbia English department writing his dissertation on literary and cultural criticism during the Cold War. Part of his research focused on how criticism was influenced by American ideology of the time, and he requested CIA records on Spender and Eliot, who died in 1995 and 1965, respectively.

Rubin argued that the information was improperly withheld for two reasons. First, the writers were dead.<sup>262</sup> Second, their involvement in the Congress for Cultural Freedom had already been disclosed in a book entitled *The Cultural Cold War*, which revealed covert CIA financing of writers and artists to promote U.S. interests abroad.<sup>263</sup> The CIA argued that it could neither confirm nor deny the existence of any such records because such information would be exempt from disclosure under Exemption 3 and the National Security Act of 1947.<sup>264</sup> In addition, the district court echoed another of the holdings in *Sims*—one that also came up in the D.C. Circuit's *Assassinations Archives* case<sup>265</sup>—that the age of a requested document cannot be considered when determining whether it should be released.<sup>266</sup>

Besides these most recent cases, appellate courts for the First, Fifth, Ninth and D.C. Circuits decided six FOIA cases that followed *Sims* from 1989 to 1996,<sup>267</sup> and the District Court for the District of

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260. *Rubin v. CIA*, 01 CIV. 2274 (DLC), 2001 U.S. Dist. LEXIS 19413, at \*1 (S.D.N.Y. Nov. 30, 2001).

261. *Id.* at \*3.

262. *Id.* at \*13.

263. *Id.* at \*14.

264. *Id.* at \*15.

265. *Assassination Archives and Research Ctr. v. CIA*, 334 F.3d 55 (D.C. Cir. 2003).

266. *Rubin*, 01 CIV. 2274 (DLC), LEXIS 19413, at \*14.

267. *Minier v. CIA*, 88 F.3d 796 (9th Cir. 1996); *Maynard v. CIA*, 986 F.2d 547 (1st Cir. 1993); *Sullivan v. CIA*, 992 F.2d 1249 (1st Cir. 1993); *Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992); *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990); *Knight v. CIA*, 872 F.2d 660 (5th Cir. 1989).

Columbia ruled on four such cases from 1985 to 1999.<sup>268</sup> For example, the circuit court rulings denied requests for:

- Documents concerning the disappearance of a pilot during a flight over Cuba in 1961. The FOIA request was made by his former wife in 1993.<sup>269</sup>
- Background information on a murder victim, who was an Iranian national with ties to the CIA. The information was requested during the pretrial discovery process by the murder defendant, who was on trial in California.<sup>270</sup>
- Access to twenty-five-year-old CIA records on an alleged plot by Dominican Republic government agents to kidnap President John F. Kennedy's daughter, Caroline.<sup>271</sup> The information was requested by a historian.
- Information concerning the mysterious 1985 sabotage of the Greenpeace vessel "Rainbow Warrior," which sank in the harbor at Auckland, New Zealand, after a bomb attached to its hull exploded.<sup>272</sup> The request came from a Greenpeace activist.

## V. The Argument for a Congressional Remedy

As this article has attempted to show, the Supreme Court's decision to grant the Director of Central Intelligence uncurbed authority to withhold information is at odds with the FOIA.<sup>273</sup> Congress consistently has supported a general philosophy of full agency disclosure grounded in the accountability principle of democracy, which empowers the public with a right to know what their government is up to.<sup>274</sup>

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268. *Fed'n of Am. Scientists v. CIA*, No. 98-2107, 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 12, 1999); *Fitzgibbon v. Secret Serv.*, 747 F. Supp. 51 (D.D.C. 1990); *Allen v. Dep't of Defense*, 658 F. Supp. 15 (D.D.C. 1986); *U.S. Student Ass'n v. CIA*, 620 F. Supp. 565 (D.D.C. 1985).

269. *Maynard*, 986 F.2d 547.

270. *Hunt*, 981 F.2d 1116.

271. *Fitzgibbon*, 911 F. 2d 755.

272. *Knight*, 872 F.2d 660.

273. 5 U.S.C. § 552 (2000).

274. See H.R. REP. NO. 89-1497, at 5 (1966); S. REP. NO. 89-813, at 3 (1965); H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974); H.R. REP. NO. 94-880, pt. 1, at 23 (1976); H.R. REP. NO. 104-795, at Sec. 2(a)(3)&(4) (1996). The Supreme Court has consistently recognized this principle. See, e.g., *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 494 (1994); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978); *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1976); *EPA v. Mink*, 410 U.S. 73, 80 (1973).



### A. Contravening Legislative Intent

The record shows that legislators enacted the FOIA to “pierce the veil” of government secrecy<sup>275</sup> and provide a check against corruption by holding government officials accountable to the public.<sup>276</sup> The legislative history of the FOIA shows that Congress, through the statute’s nine exemptions, also recognized that the Executive Branch has a legitimate need to keep some information confidential.<sup>277</sup> Legislators emphasized, however, that the exemptions are to be narrowly construed and limited in their scope, and that disclosure, not secrecy, is the FOIA’s dominant objective.<sup>278</sup> As outlined earlier, Congress’ FOIA reform amendments in 1974<sup>279</sup> and in 1976<sup>280</sup> evince a legislative intent to place strict limits on agency discretion.

The Supreme Court majority opinion in *CIA v. Sims* discounted this extensive history,<sup>281</sup> and instead based its rationale principally on the National Security Act of 1947.<sup>282</sup> By doing so, the Court failed to engage in a true balancing test—as prescribed by Congress—to weigh the public’s interest in disclosure against the CIA’s interests in secrecy.<sup>283</sup> The Court erred further by engaging in a highly selective reading of a crucial amendment to the National Security Act—the CIA Information Act of 1984.<sup>284</sup> Indeed, the CIA Information Act of 1984 holds special significance because—unlike the National Security Act of 1947—it was passed after the FOIA was enacted, and it directly addresses Agency disclosure obligations.<sup>285</sup>

The *Sims* majority opinion focused mainly on a provision of the CIA Information Act that makes “operational files” confidential,<sup>286</sup> while it ignored key language that allows only *limited* agency

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275. *Rose*, 425 U.S. at 361 (quoting *Rose v. Dep’t of the Air Force*, 495 F.2d 261, 263 (1974)).

276. *Robbins Tire*, 437 U.S. at 242.

277. 5 U.S.C. § 552(b)(1-9).

278. *Rose*, 425 U.S. at 361 (quoting *Rose*, 495 F.2d at 263).

279. Pub. L. No. 93-502, 88 Stat. 1561 (1974).

280. Pub. L. No. 94-409, 90 Stat. 1241 (1976).

281. See H.R. REP. NO. 89-1497, at 5 (1966); S. REP. NO. 89-813, at 3 (1965); H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974); H.R. REP. NO. 94-880, at pt. 1, 23 (1976); H.R. REP. NO. 104-795, at Sec. 2(a)(3)&(4)(1996).

282. *CIA v. Sims*, 471 U.S. 159, 167-173 (1985).

283. See S. REP. NO. 89-813, at 3.

284. 50 U.S.C. § 431, 98 Stat. 2209 (1984).

285. See 50 U.S.C. § 431, 98 Stat. 2209, 2209-2210.

286. *Sims*, 471 U.S. at 168 n.11 & 174 n.19.

discretion over all other CIA documents and records.<sup>287</sup> The House report that accompanied the CIA Information Act clearly stated that one of the purposes for exempting operational files was to improve the CIA's ability to respond to FOIA requests "in a timely and efficient manner, *while preserving undiminished the amount of meaningful information releasable to the public.*"<sup>288</sup> The report declared:

The Agency's acceptance of the obligation under the FOIA to provide information to the public not exempted under the FOIA is one of the linchpins of this legislation. The [FOIA] has played a vital part in maintaining the American people's faith in their government, and particularly in agencies like the CIA that must necessarily operate in secrecy. *In a free society, a national security agency's ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected.*<sup>289</sup>

The Burger opinion failed to consider several provisions in the CIA Information Act that evinced congressional intent to limit CIA discretion and make the Agency more accountable to Congress, the courts and the general public.<sup>290</sup> For example, the Act states that operational files "shall continue to be subject to search and review" for information subject to investigations by Congress, the Department of Justice or other investigatory bodies into improper or unlawful activities.<sup>291</sup> Further, the CIA Information Act reiterates that the FOIA establishes that judicial review, including *in camera* inspection, is available to a FOIA requester who alleges that the CIA has improperly withheld a record.<sup>292</sup> Another provision limiting blanket CIA discretion requires that the Agency consult with the Archivist of the United States, the Librarian of Congress and appropriate representatives selected by the Archivist in order to conduct periodic and systematic reviews of documents for their historical value, their declassification, and their release.<sup>293</sup>

In addition to the selective reading of the FOIA and the National Security Act, another problem is that the *Sims* Court's rationale was grounded, in large part, on the flawed principle of "great deference."

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287. See 50 U.S.C. § 431, 98 Stat. 2209, 2209-2210.

288. H.R. REP. NO. 98-726, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3742.

289. *Id.* at 9, *reprinted in* 1984 U.S.C.C.A.N. 3747 (emphasis added).

290. 50 U.S.C. § 431, 98 Stat. 2209, 2209-2210.

291. 50 U.S.C. § 431.

292. 50 U.S.C. § 431, 98 Stat. 2210.

293. 50 U.S.C. § 431.

## B. The Myth of “Great Deference”

Under the theory of “great deference,”<sup>294</sup> the CIA alone is in the unique position of being best able to determine whether information it possesses poses a danger to national defense and foreign relations.<sup>295</sup> Burger wrote that the CIA director is the only person familiar with the whole picture—the only one able to observe each individual piece of intelligence information and tie them all together, even when a single piece is not obviously important by itself.<sup>296</sup> A review of the pertinent federal case law shows that this “mosaic” or “compilation” theory was first accepted by the judiciary in a 1972 decision by the U.S. Court of Appeals for the D.C. Circuit.<sup>297</sup> Although this theory had been applied in other cases after 1972,<sup>298</sup> it was not until *CIA v. Sims* that this rationale for withholding was endorsed by the Supreme Court.<sup>299</sup>

294. *CIA v. Sims*, 471 U.S. 159, 179 (1985).

295. *Id.* at 178.

296. *Id.*

297. *United States v. Marchetti*, 466 F.2d 1309, 1318 (D.C. Cir. 1972) (“What may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context”).

298. See, e.g., *Am. Friends Serv. Comm. v. DOD*, 831 F.2d 441, 444-45 (3d Cir. 1987) (recognizing “compilation” theory) (decided under Executive Order 12,356); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (explicitly acknowledging “mosaic-like nature of intelligence gathering”) (decided under Executive Order 12,065); *Taylor v. Dep’t of the Army*, 684 F.2d 99, 105 (D.C. Cir. 1982) (upholding classification of compilation of information on army combat units) (decided under Executive Order 12,065); *Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980) (Observing that a piece of intelligence is like a piece of a jigsaw puzzle, not of obvious importance by itself). See also *Loomis v. United States Dep’t of Energy*, No. 96-CV-149, 1999 WL 33541935 at \*5, 7 (N.D.N.Y. Mar. 9, 1999) (finding that safety measures regarding nuclear facilities set forth in manuals and lay-out plans contain highly technical information and that “such information in the aggregate could reveal sensitive aspects of operations”) (decided under Executive Order 12,958), *aff’d*, 21 Fed. Appx. 80 (2d Cir. 2001); *Nat’l Sec. Archive v. FBI*, 759 F. Supp. 872, 877 (D.D.C. 1991) (holding that disclosure of code names and designator phrases could provide a hostile intelligence analyst with a “common denominator” permitting the analyst to piece together seemingly unrelated data into a snapshot of specific FBI counterintelligence activity) (decided under Executive Order 12,356); *Jan-Xin Zang v. FBI*, 756 F. Supp. 705, 709-10 (W.D.N.Y. 1991) (upholding classification of any particular source identifying word or phrase that could by itself or in aggregate lead to disclosure of intelligence source) (decided under Executive Order 12,356).

299. *Sims*, 471 U.S. at 178, quoting *Halperin*, 629 F.2d at 150 (“Each individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself”). In *CIA v. Sims* the Supreme Court recognized the statutory authority of the National Security Act of 1947 as a broad basis to defend CIA secrecy at the discretion of the Director of Central Intelligence. 471 U.S. at 167-68. However, the issue of CIA secrecy had been raised frequently in lower federal courts before then. According to Professors Harold Edgar and Benno C. Schmidt, Jr., the government’s first

The recent findings by the 9/11 Commission<sup>300</sup> and the Senate and House joint panel investigation into the terrorist attacks<sup>301</sup> clearly and dramatically illustrate the fallibility of the “great deference” rationale, which supports broad authority for unreviewable CIA secrecy and effectively blocks efforts by the public and the press to evaluate the Agency’s performance. Among other findings, the two government investigations revealed:

- The CIA had intelligence in its files since 1998 indicating that al Qaeda had plans to hijack passenger planes and use them as weapons, but the Agency’s Counterterrorist Center never developed a plan to deal with that threat.<sup>302</sup>
- For nearly two years before the attacks, the CIA had been aware of the terrorist connections of two of the hijackers, Khalid al-Midhar and Nawaq al Hazmi, who had moved to San Diego, California, in 2000.<sup>303</sup>
- Former CIA chief George J. Tenet was “either unwilling or unable to marshal the full range of intelligence community resources necessary to combat the growing threat” of terrorism.<sup>304</sup>

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big victory in the legal battles to protect CIA secrecy began with an attempt by Victor Marchetti, a former top CIA official, to write a book after he left the Agency. Edgar & Schmidt, *supra* note 32, at 368. The D.C. Circuit held that Marchetti must submit his book for censorship. *See Marchetti*, 466 F.2d at 1318. The next big victory for CIA secrecy came with court approval of the so-called Glomar response, which permits the CIA to respond to a FOIA request by saying the Agency can “neither confirm nor deny” the existence of a document for national security reasons. This response was first accepted by a court in 1976 when a journalist requested information about a research ship called the Hughes Glomar Explorer. The CIA spent more than \$350 million in building this vessel in a joint project with the late Howard Hughes in an effort to raise a Soviet submarine that sank in the Pacific. *See Phillippi v. CIA*, 546 F.2d 1009, 1012-13 (D.C. Cir. 1976). The CIA’s right to neither confirm nor deny the existence of CIA-held information was reinforced by the sweeping authority granted to the CIA director in *CIA v. Sims*. *See Sims*, 471 U.S. at 181.

300. *See* The 9/11 COMMISSION REPORT, *supra* note 1.

301. *See* Senate and House Select Comm. Report, *supra* note 1.

302. The 9/11 COMMISSION REPORT, *supra* note 1, at 128-30 & 484 n.112; Senate and House Select Comm. Report, *supra* note 1, at 9. *See also* Walter Pincus and Dan Eggen, *Agencies Faulted as Blind to al Qaeda*, WASH. POST., April 15, 2004, at A1, A12. The *Post* made this disclosure based on an 9/11 Commission interim report that was released several months before its final report. *Id.*

303. The 9/11 COMMISSION REPORT, *supra* note 1, at 218-21; Senate and House Select Comm. Report, *supra* note 1, at 13. *See also* David Johnston, *Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A1.

304. Senate and House Select Comm. Report, *supra* note 1, at 39. *See also* Susan Schmidt and David Von Drehle, *Hill’s 9/11 Probe Finds Multiple Failures; Congressional Inquiry Faults FBI Monitoring of Hijackers*, WASH POST, A1, A15, July 25, 2003.

Besides what government investigators learned, news media reports also have provided information about CIA lapses. For example, *The New York Times* reported that the Agency failed to pursue a crucial lead provided by German intelligence officials two-and-a-half years before the 9/11 attacks. German agents gave the CIA the first name and the Hamburg, Germany, telephone number for terrorist Marwan al-Shehhi in March 1999. On September 11, 2001, al-Shehhi took the controls of United Airlines Flight 175 and flew it into the South Tower of the World Trade Center.<sup>305</sup>

In addition to the litany of CIA failures and misjudgments in connection with the 9/11 attacks, the Senate Intelligence Committee has harshly criticized the CIA for grave miscalculations in its role in the 2003 U.S. invasion of Iraq.<sup>306</sup> In a scathing and unanimous report released in July 2004, the committee found that CIA assessments of Iraqi weapons strength—particularly concerning chemical and biological weapons of mass destruction, and future nuclear capability—were overstated or unfounded.<sup>307</sup> The 511-page report described the Agency as a broken and dysfunctional corporate culture suffering from poor management,<sup>308</sup> and concluded: “In the end, what the President and the Congress used to send the country to war was information provided by the intelligence community, and that information was flawed.”<sup>309</sup>

Such alarming CIA failures are not limited only to the recent events of 9/11 and the war in Iraq. Indeed, the specious “great deference” theory has survived despite a long history of CIA troubles and embarrassments going back decades. Historian Jeffrey A. Smith observed that the lack of public accountability has “allowed numerous follies” by the Agency since the 1960s.<sup>310</sup> Writing about the

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305. See James Risen and Eric Lichtblau, *C.I.A. Was Given Data on Hijacker Long Before 9/11*, N.Y. TIMES, Feb. 24, 2004, at A1, A17.

306. See Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq, Select Comm. on Intelligence, U.S. Senate, 108th Cong., 2d Sess., July 7, 2004 [hereinafter *The Prewar Intelligence Report*]. See also Douglas Jehl, *Senators Assail C.I.A. Judgments on Iraq's Arms as Deeply Flawed*, N.Y. TIMES, July 10, 2004, at A1; Dana Priest, *Report Says CIA Distorted Iraq Data*, WASH. POST, July 12, 2004, at A1.

307. See *The Prewar Intelligence Report*, *supra* note 306.

308. See *id.*

309. See *id.* Several months before the Senate Intelligence Committee's report was released, Bob Woodward disclosed that, in the weeks before the 2003 invasion of Iraq, former CIA Director Tenet personally assured President George W. Bush that it was a “slam-dunk case” to prove to the American people that Iraq possessed weapons of mass destruction. See Bob Woodward, *With CIA Push, Movement to War Accelerated*, WASH. POST., April 19, 2002, at A1, A11.

310. JEFFREY A. SMITH, WAR AND PRESS FREEDOM: THE PROBLEM OF

Kennedy administration's "misadventures in covert actions," Smith said that "[p]erhaps the most irrational and inept ones were the dozens of CIA schemes to topple the Soviet-backed regime in Cuba, schemes that included paramilitary raids, counterfeiting, contamination of sugar crops, and a series of plots to kill Castro with the help of organized crime figures."<sup>311</sup>

In the introduction to Sen. Daniel Patrick Moynihan's book, *Secrecy*, Richard Gid Powers noted that the CIA failed to foresee the 1979 Soviet invasion of Afghanistan<sup>312</sup> and grossly miscalculated the size of the Soviet and East German economies in the years immediately before the collapse of the Soviet Union.<sup>313</sup> In fact, Moynihan pointed out that CIA estimates of Soviet productivity and military intentions during the Cold War "had failed from the beginning," as early as 1948.<sup>314</sup> Moynihan also noted that during the Gerald Ford Administration, CIA assessments of Soviet economic and military capabilities "were wrong by 180 degrees."<sup>315</sup> In the years following the end of the Cold War, the Agency had been involved in a series of embarrassing incidents that have further contributed to an Agency record of imprudent actions and outright misdeeds such as engaging in corporate espionage abroad,<sup>316</sup> providing U.S. Presidents with information supplied by double agents,<sup>317</sup> and failing to identify

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PREROGATIVE POWER 225 (Oxford University Press 1999).

311. *Id.* at 180.

312. RICHARD GID POWERS, in DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 13-14 (Yale University Press 1998).

313. *Id.*

314. *Id.* at 197-98.

315. *Id.* at 198-99.

316. In 1995, four CIA officers were accused by France of conducting an economic espionage operation against the French government. The CIA was, in effect, spying for Hollywood. The United States was unhappy with French demands to restrict imports of U.S. television programming into Europe, and part of the CIA operation was to determine the strength of the French bargaining position in television and telecommunications trade negotiations. The bungled operation forced the CIA to suspend virtually all of its operations in France in 1995, thus undermining the CIA's ability to collect information in France on terrorism and arms smuggling. *Downplayed by CIA, Paris Incident Has Wide Impact*, L.A. TIMES, Oct. 11, 1995, at A1.

317. *CIA Linked to at Least 35 Suspect Reports*, L.A. TIMES, Nov. 10, 1995, at A21. It was learned that between 1986 and 1994, CIA officers passed on at least 35 reports to top U.S. policy-makers without disclosing that the information came from suspected Soviet double agents. *Id.* Of these, there were at least 11 instances in which the CIA gave Presidents reports from operatives known by the CIA to be double agents, said Sen. Arlen Specter, chairman of the Senate Select Committee on Intelligence. *3 Ex-CIA Directors Blamed for Agency Role in Misdeeds*, L.A. TIMES, Nov. 1, 1995, at A1. CIA Inspector General Frederick Hitz recommended in 1995 that three former CIA directors be held accountable for disinformation that was passed to the President from Soviet double

traitors operating in its own midst.<sup>318</sup> So turbulent were those years that the appointment of Tenet as acting CIA director in 1996 gave the Agency its fifth director since 1991.<sup>319</sup> During testimony before the 9/11 Commission, Tenet characterized the Agency he inherited in 1996 as “a program in disarray.”<sup>320</sup> Despite his efforts to improve operations, the CIA was caught by surprise in 1998 when it failed to anticipate a nuclear test by India.<sup>321</sup>

Journalist David Brooks, former Op-ed Editor of the *Wall Street Journal* and former Senior Editor of *Weekly Standard* magazine, put it bluntly:

For decades, the U.S. intelligence community has propagated the myth that it possesses analytical methods that must be insulated pristinely from the hurly-burly world of politics. The CIA has portrayed itself as, and been treated as, a sort of National Weather Service of global affairs. It has relied on this aura of scientific objectivity for its prestige,<sup>322</sup> and to justify its large budgets, despite a record studded with error.

The CIA's troubled history, underscored by the missteps surrounding the 2001 terrorist attacks on New York and Washington, D.C., and the miscalculations before the 2003 invasion of Iraq,

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agents. Hitz blamed former directors R. James Woolsey, Robert M. Gates and William H. Webster for the CIA's failure to inform the White House that the CIA had known that much of the top-secret intelligence information acquired by the United States was obtained from Soviet double agents. *Id.*

318. In 1994, CIA agent Aldrich H. Ames, a former chief of the Soviet counterintelligence branch, had been selling CIA secrets to Moscow for nearly a decade. He betrayed three dozen Soviets who worked for the CIA, ten of whom were executed. *The Capture of a Deadly Mole*, NEWSWEEK, Mar. 7, 1994, at 24. Other CIA counterintelligence failures include the defection to Moscow of former CIA agent Edward Lee Howard in September 1985; the 1987 discovery that almost all the 40 or so agents among Fidel Castro's military and intelligence services recruited by the CIA were really double agents; and the 1989 finding that the handful of East German agents recruited by the CIA were actually double agents. See *CIA Struggles to Find Identity in a New World; Ames Scandal Highlights Many Agency Problems*, WASH. POST, May 9, 1994, at A1. Two years later, CIA officer Harold J. Nicholson, the former Romanian station chief, was charged with espionage and conspiracy for betraying American spies and passing a wide range of top-secret information to Moscow. *Career CIA Officer Is Charged With Spying for Russia*, L.A. TIMES, Nov. 14, 1996, at A1.

319. In the decade before Tenet took office, William H. Webster was the Director of Central Intelligence, from 1987-1991; Robert M. Gates, from 1991-1993; R. James Woolsey, from 1993-1995; and John M. Deutch, from 1995-1996. Tenet succeeded Woolsey as acting DCI and officially took office July 11, 1997. Tenet, who stepped down on July 11, 2004, the seventh anniversary of his tenure, is the second longest-serving director in the CIA's history. Allen Dulles served as director from 1953 to 1961.

320. Douglas Jehl, *Caution and Years of Budget Cuts Are Seen to Limit C.I.A.*, N.Y. TIMES, May 11, 2004, at A1.

321. *Id.*

322. David Brooks, *The CIA: Method and Madness*, N.Y. TIMES, Feb. 3, 2002, at A23.

seriously challenges the worn-out core notion that secrecy in matters of intelligence and national security automatically outweighs the public benefits of disclosure. The kind of blanket secrecy the Supreme Court endorsed in *CIA v. Sims* does not fit in the political and social cultures of today's America. The Court majority's rationale was a product of the Cold War era's tolerance of unchecked government secrecy in matters even marginally related to national security. Paternalistic government and blind public acceptance of policy when it comes to this nation's defense and foreign relations—the core interests at stake in CIA intelligence gathering—represent the thinking of a culture that no longer exists.

In fact, the beginnings of this shift in culture were recognized more than a generation ago. During Senate debates on the 1974 FOIA amendment to revise the national security exemption, Sen. Jacob Javits said the American public had come to expect more government openness and accountability:

[T]he whole movement of government, especially in view of Government's experience in Vietnam, Watergate, and many other directions . . . should be toward more openness rather than being toward more closed. . . . [W]e have finally come abreast of the fact of life that it is not providence on Mount Sinai that stamps a document secret or top secret.<sup>323</sup>

What is needed in the post-9/11 era, as The 9/11 Commission pointed out, is a new model for how the CIA gathers, evaluates and *makes accessible* intelligence information of public importance. The 9/11 Commission Report is replete with references to the “new challenges”<sup>324</sup> that the United States faces in the twenty-first century in terms of its military,<sup>325</sup> world politics,<sup>326</sup> models of governmental management<sup>327</sup> and, of course, national security.<sup>328</sup> Truly, as the 9/11 Commission noted: “[T]he national security institutions of the U.S. government are still the institutions constructed to win the Cold War. The United States confronts a very different world today.”<sup>329</sup>

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323. House and Senate Debate on Freedom of Information Act Amendments of 1974, Senate Debate and Vote, May 30, 1974 (Statement by Sen. Jacob Javits), *reprinted in* Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Joint Comm. of the Comm. of Government Operations of the U.S. House of Representatives, and the Comm. on the Judiciary of the U.S. Senate [hereinafter *THE 1974 FOIA SOURCE BOOK*], 94th Cong., 1st Sess., March 1975, at 311.

324. *THE 9/11 COMMISSION REPORT*, *supra* note 1, at 353.

325. *Id.* at 208.

326. *Id.* at 362.

327. *Id.* at 406.

328. *Id.* at 399.

329. *Id.*



Likewise, it is also time for a new public-information access model for the twenty-first century—a more mature model of democratic transparency that takes into account the powerful and profound societal and political changes the United States has undergone since Richard Nixon resigned, since Saigon fell and since the Soviet Union collapsed. This new model must reflect the fundamental democratic principle of public accountability—the overarching theory behind the FOIA. The 9/11 Commission Report emphasized the important role that *public* oversight plays in connection with effective congressional oversight to hold the CIA and the intelligence community at large accountable:

[T]he Intelligence committees cannot take advantage of democracy's best oversight mechanism: public disclosure. This makes them significantly different from other congressional oversight committees, which are often spurred into action by the work of investigative journalists and watchdog organizations.<sup>330</sup>

One of the big dangers posed by the Supreme Court's imprimatur of the "great deference" rationale in *CIA v. Sims*<sup>331</sup> is that the CIA can evade the prod of public accountability and exploit secrecy to conceal its failures and blunders. As First Amendment scholar and Harvard law professor Zechariah Chafee, Jr. noted in 1947, the same year, incidentally, that Congress enacted the National Security Act:

No doubt there are many matters which ought not to be disclosed for a time, but the officials should not have a free hand to determine what those matters are or to lock them up forever. It may be human nature for them to want their mere say-so to be decisive on the need for secrecy, but the possession of such a power would allow them to hoist public safety as an umbrella to cover their own mistakes.<sup>332</sup>

Excessive secrecy that cannot be pierced by the public can not only hide embarrassing CIA failures and mismanagement, but also threatens Agency effectiveness and good management. James Russell Wiggins, a former *Washington Post* managing editor who was at the forefront of newspaper industry support for the Freedom of Information Act of 1966, observed that government secrecy relieves officials "of the prod of public knowledge, the spur of public criticism and the aid of public suggestion."<sup>333</sup>

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330. See THE 9/11 COMMISSION REPORT, *supra* note 1, at 103.

331. *CIA v. Sims*, 471 U.S. 159, 178-81 (1985).

332. ZECHARIAH CHAFEE, JR., 1 GOVERNMENT AND MASS COMMUNICATIONS 14 (1947).

333. WIGGINS, *supra* note 48, at 113.

At the very least, a legislative remedy is urgently needed to replace the broad definition of “intelligence sources” in *Sims* because its impact holds far-reaching implications for public access in the political climate of the post 9/11 era. For example, a section of the Homeland Security Act of 2002, which lays out guidelines for “Access to Information,” plainly states: “[A]ny information under this act is shared, retained, and *disseminated consistent with the authority of the Director of Central Intelligence to protect intelligence sources and methods under the National Security Act of 1947.*”<sup>334</sup> What this language strongly suggests is that records compiled under the authority of the Homeland Security Act can be deemed exempt from the FOIA if the Director of Central Intelligence merely asserts that the information could reveal “intelligence sources” as defined by the Court in *CIA v. Sims*.<sup>335</sup>

### C. A Model for CIA Disclosure Requirements Under the Freedom of Information Act

Congress needs to redefine “intelligence sources” in a way that protects legitimate sources of intelligence information, but also recognizes that not every source of information is an intelligence source. An appropriate definition should provide a non-discretionary test to clarify whether a source of information is, first, an “intelligence source,” and, second, deserving of confidentiality. For such a definition, the test crafted by Justices Marshall and Brennan in their *Sims* concurrence still holds merit today. Under their standard, confidentiality would extend to “intelligence sources” who provide information on either an explicit or implicit promise of confidentiality. Further, confidentiality also would apply to information that could be expected to lead to the identification of an intelligence source.<sup>336</sup>

Such a revised definition for “intelligence sources” could prove to be a significant step toward achieving CIA accountability under the FOIA. However, a more substantive and lasting solution would be for Congress to nullify the *Sims* Court’s decision altogether. In fact, Chief Justice Burger wrote in *Sims* that “Congress certainly is capable of

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334. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2147, §201(d)(12)(B)(emphasis added). President Bush signed the legislation into law on Nov. 25, 2002, after Congress reconvened for an extraordinary “lame duck” session to enact the law on an accelerated schedule.

335. *Sims*, 471 U.S. at 168-73.

336. *Id.* at 193-94 (Marshall, J., concurring).

drafting legislation that narrows the category of protected sources of information.”<sup>337</sup>

Congress has taken such measures in the past. This article has reviewed the two congressional precedents for overriding previous Supreme Court FOIA decisions: Exemption 1 was revised in 1974 to nullify *EPA v. Mink*,<sup>338</sup> and Exemption 3 was revised in 1976 to nullify *Administrator, FAA v. Robertson*.<sup>339</sup> These revisions were prompted by Congress’ intent to maintain a check on executive branch authority<sup>340</sup> and to limit agency discretion.<sup>341</sup>

A key congressional committee already is on record for refusing to endorse *CIA v. Sims*.<sup>342</sup> However, Congress failed to follow through and officially repudiate the Court’s decision.<sup>343</sup> In 1992, lawmakers challenged the *Sims* ruling when the House of Representatives reauthorized the National Security Act.<sup>344</sup> The conference committee report on the Intelligence Authorization bill stated: “Whether there is justification to permit the DCI to withhold information concerning intelligence sources and methods which [are] not classified in response to [FOIA] requests . . . is a matter which deserves closer, more systematic review.”<sup>345</sup> Although legislators reauthorized the National Security Act provision that states the Director of Central Intelligence has “the responsibility to protect intelligence sources and methods from unauthorized disclosure,”<sup>346</sup> the conferees emphasized that they “do not intend their [reauthorization] action to constitute an endorsement of the holding in *Sims*.”<sup>347</sup>

Congressional failure to follow through on the 1992 conference committee’s report on *CIA v Sims* is yet another example of what The 9/11 Commission characterized as Congress’ much larger failure to exercise the imagination needed to challenge outmoded intelligence traditions and muster the political will necessary to hold the CIA accountable for its actions and performance.<sup>348</sup> In effect, congressional

337. *Id.* at 169 n.13.

338. *EPA v. Mink*, 401 U.S. 73 (1972).

339. *FAA v. Robertson*, 422 U.S. 55 (1974).

340. See H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6290.

341. H.R. REP. NO. 94-880, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 2204-05.

342. *Sims*, 471 U.S. 159.

343. See H.R. CONF. REP. NO. 102-963, at 88 (1992), reprinted in U.S.C.C.A.N. 2614.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. See *supra* note 27.

legislators have virtually abrogated their CIA oversight responsibilities. Accordingly, the Commission concluded that Congress shares equally in the blame for the 2001 terrorist attacks. The 9/11 Commission Report put it bluntly: "Congressional oversight for intelligence—and counterterrorism—is now dysfunctional."<sup>349</sup>

This article, therefore, proposes a two-prong model for a legislative remedy that would take an important first step toward CIA oversight and accountability. Under this model, Congress would nullify *CIA v. Sims* by (1) clarifying that the CIA is subject to disclosure under the Freedom of Information Act, and (2) appointing a special court that would deal exclusively with all access requests rejected on grounds of national security.

1. *Congress needs to establish that CIA withholding decisions are subject to the FOIA, including key Exemption 1 provisions permitting de novo judicial review and requiring the segregation and release of unclassified material.*

This proposed change is a modest one. The nine exemptions to the FOIA already provide a wide variety of legitimate exceptions to disclosure that do not conflict with congressional guidelines intended to limit CIA discretion in FOIA withholding decisions.<sup>350</sup> Exemptions 6 and 7 alone, the privacy and law enforcement exemptions, could easily be used to protect unclassified sensitive CIA information,<sup>351</sup> and Exemption 1, the national security exemption, protects classified information.<sup>352</sup>

This measure would enhance CIA accountability and government transparency by eliminating Agency evasion of two congressional requirements that check CIA authority: *de novo* review and the segregation rule. As previously discussed, *de novo* judicial review enables a court to confirm that assertedly classified information actually falls within the category of information protected under Executive Order.<sup>353</sup> Under this requirement the CIA

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349. The 9/11 COMMISSION REPORT, *supra* note 1, at 420.

350. 5 U.S.C. § 522(b)(1)-(9) (2000). The FOIA does not apply to matters that fall under the categories of (1) classified information and national security; (2) internal agency personnel information; (3) information exempted by statutes; (4) trade secrets and other confidential business information; (5) agency memoranda; (6) disclosures that invade personal privacy; (7) law enforcement investigation records; (8) reports from regulated financial institutions; and (9) geological and geophysical information.

351. 5 U.S.C. § 552(b)(6), (7) (2000).

352. 5 U.S.C. § 552(b)(1) (2000).

353. 5 U.S.C. § 552(a)(4)(B) (2000).

would be subject to *de novo* review whenever a FOIA requester appeals a withholding decision.<sup>354</sup>

The rationale behind *de novo* judicial review in national security matters was clearly and forcefully expressed by Rep. John Moss, widely recognized as the driving force behind the Freedom of Information Act of 1966 and a principal crafter of the statute's 1974 amendments.<sup>355</sup> He argued that judges have the capacity to review even sensitive matters of national security.<sup>356</sup> "I do not think we have to make dummies out of [judges] by insisting they accept without question an affidavit from some bureaucrat—anxious to protect his decisions whether they be good or bad—that a particular document was properly classified and should remain secret," Moss declared during the House debate on the 1974 FOIA amendments. "No bureaucrat is going to admit he might have made a mistake."<sup>357</sup> Moss said it was the full intent of Congress in 1966, and again in 1974, to make it "crystal clear" that the courts must be "free to employ whatever means they find necessary to discharge their responsibilities" through comprehensive *de novo* review in Exemption 1 national security matters.<sup>358</sup>

When Congress amended the FOIA in 1974 to permit *de novo* review in Exemption 1 cases, Congress also required the segregation and disclosure of unclassified information contained in a classified record.<sup>359</sup> CIA end-runs around both the *de novo* review and segregation requirements have been possible as a direct result of *CIA v. Sims*.<sup>360</sup> The CIA's currently uncurbed discretion for disclosure under the National Security Act is a congressionally unauthorized power that directly conflicts with Congress' intent as expressed in the 1976 FOIA amendment to Exemption 3, which specifically limits

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354. *Id.*

355. See Halstuk, *supra* note 53, at 116. From 1955 until the FOIA was enacted in 1966, Moss chaired two committees that were at the center of reform efforts to enact a federal open-records law. See also *supra* notes 53-54 and accompanying text.

356. See House and Senate Debate on Freedom of Information Act Amendments of 1974, House Debate and Vote, March 14, 1974 (Statement by Rep. John Moss), *reprinted in* THE 1974 FOIA SOURCE BOOK, *supra* note 323, at 257.

357. *Id.*

358. *Id.* at 258.

359. 5 U.S.C. § 552(a)(4)(B) (2000). See also FOIA GUIDE *supra* note 39, at 122-23. The 1974 segregation-and-disclosure rule also applies to records withheld under Exemption 1. See *Oglesby v. United States Dep't of the Army*, 79 F.3d 1172, 1180-81 (D.C. Cir. 1996); *Krikorian v. Dep't of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993).

360. See *CIA v. Sims*, 471 U.S. 159, 189-90 (1985) (Marshall, J., concurring).

agency discretion in withholding decisions.<sup>361</sup> The FOIA states that under Exemption 3, a record can be withheld under another statute “provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”<sup>362</sup>

This first prong thus represents a step toward reform by establishing limits on CIA discretion and requiring a level of judicial oversight that has been abandoned in favor of the flawed “great deference” rationale. It would mandate an interpretation of the National Security Act that strictly comports with the plain meaning and legislative intent of the FOIA and its nine statutory exemptions.

2. *Congress needs to appoint a special court that would deal exclusively with access disputes concerning national security.*

After Congress institutes *de novo* judicial review for FOIA national security disputes involving the CIA, lawmakers next must create a special court of judges with the expertise and qualifications needed to deal specifically with the complex issues that arise when there is a clash between the competing and legitimate values of government transparency and government secrecy. The need for consistent, effective and specialized judicial review of the unprecedented national security issues now facing America has become necessary because these problems are not temporary. Almost daily, global events make it abundantly clear that terrorism-related national defense issues will merit special attention for many years to come, possibly decades.

Appointing a panel of federal judges with the *bona fides* to hear such cases would rebut one of the principal objections to *de novo* review voiced by Chief Justice Burger in *CIA v. Sims*: Judges have “little or no background in the delicate business of intelligence gathering.”<sup>363</sup> It is crucial to empanel a qualified special court in order for the judiciary to exercise true *de novo* review; federal district court and appellate court judges seldom challenge a national security claim presented by the government because they simply do not want to be blamed for a disclosure decision that could later be asserted to have damaged the nation’s defense or foreign relations.<sup>364</sup> The record

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361. *See id.*

362. 5 U.S.C. § 552(b)(3) (2000) (*emphasis added*).

363. *Sims*, 471 U.S. at 176.

364. *See O'REILLY, supra* note 53, at 502. For a comprehensive examination of the failure of judges to exercise true *de novo* review in national security cases, *see* Robert P.

shows that the courts have upheld virtually every Exemption 1 withholding decision to date, mainly because of the great deference judges pay to national security claims by the government.<sup>365</sup>

There is a long history, stretching from 1855 to the 1980s, of Congress appointing special Article III federal courts to address new or emerging issues that require expertise.<sup>366</sup> In addition, this court could be statutorily empowered to appoint qualified special masters with proper security clearance and expertise to assist judges and make recommendations when large volumes of material need to be examined *in camera*.<sup>367</sup>

Finally, Congress needs to emphasize that a true balancing test should be the device used by the special court in determining whether a requested record should be disclosed. This balancing analysis, clearly prescribed by Congress in the FOIA's legislative history,<sup>368</sup> would weigh the democratic benefits of disclosure and an informed public against the CIA's practical needs for secrecy and an effective intelligence service. In other words, a true balancing would recognize that some information always can be potentially useful to an enemy, but this same information can be of much greater use to the public. Keeping this kind of information secret can hurt the nation more than help an enemy. As noted earlier, for example, congressional investigators found that for years before 9/11, the CIA had more than sufficient information about the imminent menace posed by al Qaeda to prompt defensive measures, such as strengthening aviation security and alerting the American public to the seriousness and immediacy of the potential threat.<sup>369</sup> It is highly unlikely that any of this information

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Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67 (1992).

365. See O'REILLY, *supra* note 53, at 502.

366. See U.S. CONST. art. III, § 1. Article III provides that: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* See also CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 15-21 (5th ed. 1994). For example, Congress created the Court of Claims in 1855; the Commerce Court in 1910; the Customs Court in 1926; and the Emergency Court of Appeals during the Second World War. Congress has also created several courts under Article I: the U.S. Tax Court (1969), the U.S. Court of Veterans Appeals (1988), and the U.S. Bankruptcy Court (restructured in 1984). See *id.*

367. One commentator has suggested using special masters to assist judges in district and appellate courts in FOIA national security litigation. See Deyling, *supra* note 364, at 105. That remedy by itself, however, is insufficient because, ultimately, only a federal judge has the authority to decide a FOIA exemption dispute.

368. S. REP. NO. 89-813, at 3 (1965). See also *Sims*, 471 U.S. at 189 n.5 (Marshall, J., concurring).

369. Senate and House Select Comm. Report, *supra* note 1, at xv & 118. See also *supra* notes 15-16 and accompanying text.

would have been available under the strict secrecy protections in *CIA v. Sims*.

## VI. Conclusion

When the Supreme Court exempted the CIA from the Freedom of Information Act in *CIA v. Sims*,<sup>370</sup> the majority engaged in historical revisionism, selectively interpreting the pertinent legislative histories and replacing Congress' FOIA policy judgments with Court-crafted policy.<sup>371</sup> Recent and dramatic revelations about CIA missteps in connection with the 9/11 terrorist attacks and the war in Iraq tragically illustrate the dangers of freeing the CIA from public scrutiny and evaluation.

The model proposed in this article offers a foundation for desperately needed reform by holding the CIA accountable to the public. This author understands that even if Congress were to adopt this model or a similar remedy, there still would be significant obstacles to access. Classification criteria are determined by the President, and these standards vary from administration to administration.<sup>372</sup> Further, the executive branch agencies historically have overused the "classified" stamp,<sup>373</sup> creating mountains of secret documents,<sup>374</sup> and national security under Exemption 1 traditionally

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370. 471 U.S. 159.

371. See *id.* at 193 (Marshall, J., concurring).

372. See *supra* note 101 and accompanying text. See, e.g., Exec. Order. No. 13,292, 68 Fed. Reg. 15,315 (2003). Protection of "intelligence activities" and "intelligence sources and methods" are detailed under Sec. 1.4(c); Sec. 3.4(c); Sec. 3.5 (e); and Sec. 4.3(a).

373. In one of the clearest and most forceful expressions of the dangers of overclassification, Supreme Court Justice Potter Stewart wrote in the 1971 Pentagon Papers case that "when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained." *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

374. For example, Republican and Democratic leaders of the Senate Intelligence Committee harshly criticized the CIA for overclassification when the committee investigated CIA intelligence operations in the United States invasion of Iraq. In June 2004, the CIA ruled that nearly 40 percent of a 400-page report prepared by committee contained classified materials, and the Agency deleted the information. The committee's report focused on mistakes and miscalculations in prewar intelligence about Iraq and its weapons programs. Douglas Jehl, *C.I.A. Classifies Much of a Report on Its Failings*, N.Y. TIMES, June 16, 2004, at A9. After the CIA deleted the information, Sen. Pat Roberts, the Kansas Republican who chairs the Senate Intelligence Committee, said, "I think the great majority of this report should be made public. Our report is a good one . . . and the



has been defined broadly by both Congress and the courts.<sup>375</sup> However, the overclassification problem is a separate issue, and it needs to be fought on another legislative front. Lastly, it can be argued that the FBI is subject to the FOIA, and it too was excoriated by both the congressional joint panel, and the 9/11 Commission.<sup>376</sup>

Nonetheless, decisive action to make the CIA subject to the FOIA represents a significant move toward accountability because it would eliminate the Court-sanctioned policy of *carte-blanche* secrecy now in place.<sup>377</sup> The model proposed here would provide for judicial oversight on a case-by-case basis; enhance the separation of powers doctrine by re-instituting the FOIA checks on agency discretion that Congress mandated, particularly in the 1974 and 1976 amendments; and place the burden of defending a withholding decision on the CIA, thus putting the Agency into compliance with the FOIA as Congress intended.<sup>378</sup> Moreover, such a legislative remedy would return policy-making decisions to the political branches of government where

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American People certainly deserve to see it." *Id.* According to West Virginia Sen. John D. Rockefeller, the ranking Democrat on the committee, the CIA had "overclassified much of the report to the extent that it will prevent the American public from knowing the truth about how the intelligence community performed leading up to the war." *Id.* See also THE 1974 FOIA SOURCE BOOK, *supra* note 323, at 257 for a historical view of overclassification. ("Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards for an open and democratic society, allowing too many papers to be classified for too long a time." Statement by Rep. John Moss at a March 14, 1974 House debate on the 1974 amendments to the FOIA, quoting President Richard M. Nixon). See also JOHN W. DEAN, WORSE THAN WATERGATE 17 (Little, Brown and Co. 2004).

375. See, e.g., *Bowers v. Dep't of Justice*, 930 F.2d 350, 357 (4th Cir. 1991) ("What fact or bit of information may compromise national security is best left to the intelligence experts."); *Taylor v. Dep't of the Army*, 221 U.S. App. D.C. 325, 684 F.2d 99, 109 (D.C. Cir. 1982) (the Agency's determination should be accorded "utmost deference."); *Washington Post v. Dep't of Defense*, 766 F.Supp. 1, 6-7 (D.D.C. 1991) (Judicial review of Agency classification decisions should be "quite deferential."); *Salisbury v. United States*, 223 U.S. App. D.C. 243, 690 F.2d 966, 970 (D.C. Cir. 1982) (Agency discretion merits great deference because "executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [effects] might occur as a result of public disclosure of a particular classified record."); *Halperin v. CIA*, 203 App. D.C. 110, 629 F.2d 144, 148 (D.C. Cir. 1980) (Summary judgment should be granted in favor of the government in a FOIA Exemption 1 national security action on the basis of agency affidavits as long as they simply contain "reasonable specificity" and they are not called into question by contradictory evidence or by evidence of agency bad faith.)

376. See generally, THE 9/11 COMMISSION REPORT, *supra* note 1, and Senate and House Select Comm. Report, *supra* note 1. See Philip Shenon and Eric Lichtblau, *F.B.I. Is Assailed For Its Handling of Terror Risks*, N.Y. TIMES, April 14, 2004, at A1, A15; David Johnston, *Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A-1.

377. See *CIA v. Sims*, 471 U.S. 159 (1985).

378. 5 U.S.C. § 552 (2000). See also *Sims*, 471 U.S. at 182 (Marshall, J., concurring).

public opinion can matter. American society has undergone a profound shift in culture since Vietnam, Watergate and the end of the Cold War in terms of what the public has come *to expect to know* about governance and *to demand* in transparency.<sup>379</sup> Public opinion might not matter to the appointed federal judiciary, but it *can* influence decision-making by the legislative and the executive branches. According to the findings by the 9/11 Commission and the joint Senate and House joint panel, and the subsequent public reaction to these reports, Congress already may be getting that message.

The debate surrounding these investigations is far from over. For example, immediately after the Senate and House joint panel released its findings, some U.S. counterterrorism officials argued that the report was misleading.<sup>380</sup> They contended that the report combined disparate facts whose relevance in advance of the attacks was extremely difficult to grasp. "As the information was gathered over time—like a collection of puzzle pieces—by a number of agencies . . . no one person or agency had the complete picture of Sept. 11 we have now," a senior law enforcement official said.<sup>381</sup>

That is precisely the point—contrary to former Chief Justice Burger's assertion that the Director of Central Intelligence should be granted unreviewable discretion to withhold information under the FOIA because he is the only person familiar with the whole picture and able to make sense of each piece of intelligence information.<sup>382</sup> Keeping the lid on information that should be part of the public discourse on issues of national concern conflicts with the democratic principles of transparent government and the First Amendment rights of citizens to debate vital policy questions. When the CIA shrouds itself in secrecy, limiting the information available to the public, it restricts the infusion of new ideas, innovative thinking and potential solutions to perhaps the most serious and unprecedented problems facing America today.

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379. As William Colby, Director of Central Intelligence from 1973 to 1976, wrote only a few years after Watergate and Vietnam: "[I]ntelligence judgments must be supplied impartially to all factions, to help the best solution to emerge, rather than the favored one. [The information] will then be debated and the sage unanimity of the cloistered world of intelligence will be challenged." WILLIAM COLBY & PETER FORBATH, *HONORABLE MEN: MY LIFE IN THE CIA* 465-66 (Simon & Schuster 1978).

380. David Johnston, *Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A1.

381. *Id.*

382. *Sims*, 471 U.S. at 178.

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